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BLUM and SANG,

Appellees,

v.

MORRIS KURTZON and

CELIA KURTZON,

Appellants.

APPEAL FROM SUPERIOR

COURT, COOK COUNTY.

351 I.A. 1071

MR. PRESIDING JUSTICE ROBSON DELIVERED THE OPINION
OF THE COURT.

This is an appeal by defendants, Morris Kurtzon and Celia Kurtzon, from a summary judgment for \$7,971.50 entered in the Superior Court of Cook County against them in favor of plaintiffs, Henry S. Blum and Bernard G. Sang, attorneys, members of a law partnership known as Blum and Sang, in an action for attorneys' fees. The defendants answered the complaint and demanded a jury trial. The plaintiffs moved for a summary judgment, the motion was heard and judgment entered upon the affidavits and counter-affidavits.

Defendants contend that by their answers, depositions and affidavits they have raised triable issues of fact sufficient to entitle them to a jury trial and for this reason the trial court erred in entering the judgment.

The record summarized shows that since 1944 Henry S. Blum had represented the defendants in various legal matters. On January 1, 1948, Henry S. Blum and Bernard G. Sang formed a partnership and subsequently represented defendants under the partnership name of Blum and Sang. They agreed with defendants to represent them on an



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hourly fee basis and periodically sent defendants statements of account, which are attached to the complaint as exhibits. The defendants retained the statements and promised to pay. The only mention of the work done for defendants is contained in paragraph 6 of the complaint, which states that the defendants were stockholders in an Illinois corporation and services were rendered to the defendants and each of them, who were the majority stockholders and majority directors of the corporation. Subsequently the accounts were broken down and separate bills for services were sent to defendant Morris Kurtzon, defendant Celia Kurtzon and to the Lincoln Avenue Building Account. The last sentence of the complaint alleges that the statements rendered to the defendants represented the fair and reasonable value of the services rendered defendants.

Defendants' denied that plaintiffs were retained by Celia Kurtzon; denied any contract was made through defendant Morris Kurtzon for specific hourly rates; denied they received the statements without objection, and denied that they promised to pay the amounts. They further denied that the statements represented the fair and reasonable value of the services rendered, and demanded proof of the details of the services and time expended thereon.

Plaintiffs' motion for summary judgment was supported by an affidavit signed by Bernard Sang. It states that the statements sent Morris Kurtzon were prepared from

daily time sheets kept by plaintiffs and represents accurate computations of the time expended at the hourly rates agreed upon; that defendant Morris Kurtzon agreed to pay the bills but requested that the bills originally rendered be divided into three portions, and that defendant Celia Kurtzon and the Lincoln Avenue Building Account be billed separately; that subsequently Celia Kurtzon promised to pay the bills sent to her. Sang's affidavit nowhere states the details of the services performed nor are the time sheets mentioned attached as exhibits to the affidavit. Attached to the affidavit as exhibit A are copies of the statements sent and a letter relating to the statements. Exhibit B consists of depositions taken for discovery before a notary public.

Defendants filed counter-affidavits to the motion. Defendant Morris Kurtzon in his affidavit admits that Henry Blum and the partnership of Blum and Sang represented him, furnished legal services and sent him bills. He admits that on several occasions he told Blum he would send him money but specifically denies he ever agreed to pay any specific amounts or any specific bill, or that he ever approved any statement. He further states that plaintiffs never submitted a detailed statement of services to him and that he believes plaintiffs have already been paid more than the value of their services. Defendant Celia Kurtzon states in her affidavit that plaintiffs were employed by her husband; that she never had any agreement with plaintiffs as to their hourly rates for services; that she never

approved any statements sent by plaintiffs, and that she never agreed to pay any amount to plaintiffs. She states that plaintiffs never gave her a satisfactory explanation of work performed on her behalf and that plaintiffs have already been paid more than the reasonable value of their services.

The courts of our state have repeatedly held that where the pleadings, affidavits and counter-affidavits raise issues of fact, a motion for summary judgment must be denied. Shirley v. Ellis Drier Co., 379 Ill. 105; Killian v. Welfare Engineering Co., 328 Ill. App. 375; Diversey Liquidating Corp. v. Neunkirchen, 370 Ill. 523; Publoff & Co. v. Leaf, 347 Ill. App. 191. The affidavits of the plaintiff are to be construed strictly and those for the defendant liberally. Gliwa v. Washington Polish Loan & Bldg. Ass'n, 310 Ill. App. 465, 470.

A review of the pleadings and the affidavits of the respective parties as heretofore stated, shows that triable issues of fact are raised. The first is the terms of the contract of employment. Plaintiff Sang, by his affidavit, says that the members of the firm and an associate were retained at certain hourly rates. Defendant Morris Kurtzon admitted that he employed Blum, but both defendants in their answer denied that defendant Celia Kurtzon retained Blum or Sang, or that either of them agreed to pay any specific hourly rate to plaintiffs. The depositions taken of defendants do not clarify it. In the case of Soelke v.

Chicago Business Men's Racing Ass'n, 314 Ill. App. 336, plaintiff sued for attorney's fees. A motion for summary judgment was made and plaintiff filed affidavits in support of his motion and defendants filed counter-affidavits, which denied any agreement for a retainer was made and stated that the sum paid the plaintiff was in full for services rendered. The court held that the record presented issues of fact of whether there was an agreement for a yearly retainer irrespective of services performed, whether there was anything due on a theory of quantum meruit, and that apparent good faith defenses should be submitted to a jury. The issue raised was comparable to the unequivocal denials of the defendants in this case.

Further, the plaintiffs allege that defendants received and approved certain statements and agreed to pay the amounts shown, and therefore they were entitled to recover on an account stated. The defendants by their answer and affidavits specifically denied the allegations that they approved the statements and agreed to pay them. The deposition of the defendant Morris Kurtzon indicates that there was a controversy between himself and Mr. Blum in regard to the litigation for which the plaintiffs' fees were charged. The theory of an account stated is not applicable to ^a transaction between attorneys and clients. The burden is always on an attorney to show in the first instance that any agreement he has made with his client is fair, just and reasonable. Woods v. First National Bank

of Chicago, 314 Ill. App. 340; Hopkinson v. Jones, 28 Ill. App. 409. In a suit for attorney's fees on an account stated, the client is permitted to prove that the charges are exorbitant and excessive; are not warranted by custom and usage and are otherwise unfair and unreasonable.

Henry v. LeMoyne, 219 Ill. App. 313.

We conclude that triable issues of fact were raised by the pleadings and affidavits and that the trial court was in error in allowing the motion for summary judgment. The order of the trial court is reversed and the cause remanded for trial.

Reversed and Remanded.

Tuohy, J., concurs.

Schwartz, J., took no part.

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45905

THE PEOPLE OF THE STATE OF
ILLINOIS, Appellee,

v.

JENNIE SINGER et al.,
Defendants below.

On appeal of CLARENCE A.
BLANCHARD,
Intervening Petitioner,
Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

351 I.A. 107²

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE
COURT.

Clarence A. Blanchard, appellant, hereinafter referred to as intervenor, appeals from an order of the Circuit Court of Cook County entered May 1, 1952 vacating a prior order of the same court granting leave to intervene and to file a motion to set aside a sale, in a tax foreclosure proceeding.

Chronologically the proceedings were as follows: On November 21, 1951 a decree of foreclosure and sale of general taxes affecting certain parcels of real estate in Cook County was entered in the Circuit Court by Judge Cornelius J. Harrington. On December 18, 1951 a sale was held pursuant to this decree, and the property bid in by one S. Dworin. On February 6, 1952 a decree confirming the sale was entered. On March 6, 1952 intervenor, a special assessment bondholder, filed a petition for leave to intervene and for leave to file a motion to vacate the decree and set aside the sale.

The petition alleged that the evidence upon which

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the decree of sale was based was false in that it purported to establish that taxes on the properties in question were delinquent only through 1946, when in fact taxes for 1947 and subsequent years were delinquent; furthermore that the decree provides that no certificate of purchase be issued to the successful bidder until taxes for years subsequent to 1946, together with penalties and interest, shall have been paid in full, which was contrary to law and a fraud upon the bondholders. This petition did not ask for a rule on the state's attorney to answer or otherwise plead.

An order permitting intervention and the filing of this motion was entered on the same day. Thereafter, on the call of the tax matters before Judge Brothers, the state's attorney of Cook County filed his motion to vacate and set aside the order of March 6, 1952 which granted leave to intervene and to file motion to vacate the decree of foreclosure and order of sale. After a hearing the motion of the state's attorney was granted on May 1, 1952.

Intervenor complains that Judge Brothers abused his discretion (a) in vacating the order of March 6th, and (b) in refusing to set aside the sale on the grounds of fraud.

We think there was no abuse of discretion in setting aside the order of March 6, 1952. The effect of that order was merely to extend to intervenor opportunity to show cause why he should be heard in opposition to the sale. At the time the motion was filed there was no rule on the

state's attorney to answer, and it was not until later when the matter came on for hearing before Judge Brothers that the matter was at issue. The motion to strike and dismiss raised a question as to the sufficiency and propriety of the pleading as well as intervenor's right to proceed.

We are further of the opinion that there was no abuse of discretion in the trial court's action in refusing to set aside the decree of sale and the sale, on the complaint of this bondholder, for several reasons. Under the principles laid down in People v. Schwartz, 397 Ill. 279, wide discretion is given the chancellor in approving or disapproving judicial sales. Intervenor did not participate in the sale, although charged with notice thereof through the municipality, but awaited the outcome of the bid, and then being dissatisfied, for the first time questioned the regularity of the proceeding. To permit such practice generally would tend to undermine the stability of judicial sales. In Haase v. Haase, 261 Ill. 30, in considering a similar case, the court said at page 32:

"It was only after the entry of the decree of sale that he asked to intervene, and it was then too late. There was no longer any cause in which to intervene. It was ended. An intervention implies a suit pending between parties in which another applies to be heard. After a cause has been heard and determined between the parties there can be no intervention by a third person. Whatever rights another may then have in the subject matter of the controversy must be enforced by an original proceeding."

Groves v. Farmers State Bank, 368 Ill. 35; Lenhart v. Miller, 375 Ill. 346, 351.

Furthermore, in two leading cases our Supreme Court has held that special assessment bondholders are represented by the municipalities which own the lien, the bondholders being the beneficiaries of any money collected by the municipality and not necessary parties to the foreclosure proceedings. If there is any action by said bondholders for misappropriation of the trust res such action is against the municipality and not in the original foreclosure suit. People v. Anderson, 380 Ill. 158, 165; Village of Lansing v. Sundstrom, 379 Ill. 121.

Moreover in the instant case no charge of any fraud in the holding of the sale itself is made, but merely allegations that the year 1947 and subsequent years were not included in the decree and that the guarantor of a minimum bid told the court through the state's attorney that he would pay the subsequent taxes if he were the successful bidder at the sale. The decree of foreclosure recited that fact and contained provisions that any successful bidder would have to pay such taxes. The petition fails to state with legal sufficiency the fraud required to set aside a judicial sale.

The order of May 1, 1952 of the Circuit Court of Cook County vacating and setting aside its prior order of March 6, 1952 is affirmed.

Order affirmed.

Robson, P. J., and Schwartz, J., concur.

45950

RAYMOND G. STOLTZ,
Appellee,

v.

FRANK STOLTZ, DOLLIE STOLTZ and
STOLTZ MOTORS, INC., a corporation.
Appellants.

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351 I.A. 108

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY

MR. ~~PRESIDENT~~ JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The plaintiff, Raymond Stoltz, filed a complaint in equity against the defendants asking for an accounting, dissolution of the defendant corporation and other relief, claiming that he was entitled to 50 per cent of the net profits of Stoltz Motors, Inc., and the partnership theretofore conducted by the individual defendants, Frank and Dollie Stoltz, under the name of Stoltz Motor Distributors. Defendants denied that plaintiff was entitled to any accounting. The cause was referred to a master in chancery who, pursuant to hearing, found that plaintiff was entitled to an accounting, and that there was due him from defendants the sum of \$10,116.83, which should be paid forthwith, or that in the alternative, upon failure of defendants to pay that amount, the chancellor should decree that a receiver be appointed to liquidate the corporation and, in the course of that process, pay plaintiff the amount found by the master to be due and make distribution of the balance of funds to whosoever should be entitled thereto. Exceptions filed by both plaintiff and defendants were overruled (except with respect to one item), and the chancellor entered

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a decree approving the master's report, directed that the partnership between plaintiff and the defendants, Frank and Dollie Stoltz, be dissolved, found that defendants jointly and severally were indebted to plaintiff in the sum of \$11,894.78 (which included an additional item of \$1,792.35 awarded by the chancellor in the decree for capital expenses alleged to have been improperly deducted), and further directed that plaintiff have and recover \$11,894.78 from the individual defendants and the corporation, together with costs and master's fees, that upon failure of defendants to pay said amount within five days a receiver be appointed, with the usual powers to dispose of assets, collect debts due defendants, pay all just debts and expenses, together with costs of the proceedings, pay plaintiff the sum decreed due him and the balance, if any, to the defendants as their interests might appear. Defendants appeal.

From the essential facts it appears that Frank and Dollie Stoltz are husband and wife, and that Raymond Stoltz, the plaintiff, is a son of Frank Stoltz by a prior marriage. The individual defendants have, for many years, been engaged in the business of buying and selling used automobiles. Following his discharge from the armed services in September 1945, the defendant, Frank Stoltz, and plaintiff entered into an arrangement whereby plaintiff was to purchase automobiles for the individual defendants with money supplied by them, and on every car bought he was to be paid \$25.00. In accordance with this agreement, plaintiff proceeded to

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purchase automobiles as agreed, and received the stipulated compensation until March 1, 1947. During that period he claims to have turned over to defendants all cars that he purchased, except five which Frank Stoltz rejected, and which were then sold to plaintiff's uncle. Plaintiff contends that he correctly reported to defendants the amounts ~~she~~ paid for all automobiles purchased for them.

Frank and Dollie Stoltz were absent from Chicago a great deal during the year 1947. In February of that year Frank Stoltz agreed with plaintiff that, commencing March 1, 1947, plaintiff was to manage defendants' used-car lot, purchase cars on their behalf which should be sold by defendants' business, and share equally with defendants in the net profit. This arrangement continued until June 8, 1948, when difficulties arose between Frank Stoltz and his son, as the result of which plaintiff dissociated himself from the defendants.

The defense interposed is that plaintiff is not entitled to an accounting because he does not come into equity with clean hands; that plaintiff, being a fiduciary, was charged with the utmost good faith in his dealings with defendants; that he betrayed his trust and the confidence reposed in him, cheated and defrauded defendants in falsely reporting the amounts paid for automobiles, thereby garnering to himself undisclosed gains; that, in violation of his duty, he dealt in automobiles, using defendants' funds, and failed to account to them for the amounts paid and the amounts

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realized from the resale of cars; that defendants' books do not accurately represent all the business done by plaintiff in his alleged fiduciary capacity, because of concealed transactions from which he made private profits; and that plaintiff, by his own testimony, allegedly admitted engaging in a course of illegal conduct having for its purpose cheating and defrauding not only the defendants of their share of profits, but also the United States Government of income taxes, and the State of Illinois of sales taxes, thereby making him guilty of such improper practices as to preclude him from obtaining the aid of a court of equity. With respect to the latter contention, there is no evidence indicating that income taxes due the United States Government or sales taxes due the State of Illinois were withheld by any of the parties.

Plaintiff and defendants had their own accountants who agreed on the sum of \$10,116.83, shown by the books to be due plaintiff. The master recommended that this amount be found to be due him. The chancellor added \$1792.35 for capital expenses, as heretofore stated, but there is no evidence whatever to support this finding.

Plaintiff takes the position that Stoltz's agreement with him constituted a partnership. It was an oral agreement, never reduced to writing. Plaintiff testified that about the middle of February 1947 his father told him that, since he and Mrs. Stoltz spent much of their time in Florida,

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they wanted plaintiff to operate the lot on a fifty-fifty basis, "provided I stay there every day and take care of the place"; that in buying cars he used the checks of Stoltz Motors, reported the amount he paid for every car and later got a fifty per cent division on the net profits. Exhibits in evidence show that checks from Stoltz Motor Distributors payable to plaintiff indicated they were for "commissions in full" for the period for which they were paid. Anne Iden, the bookkeeper, testified that about March 1, 1947, plaintiff began buying and selling cars for the company, and that she was present at conversations between plaintiff and his father wherein they agreed that Raymond was to share equally in the profits of the business, and that she issued checks to him as "his share of the commissions"; that Raymond had been buying cars on his own account before he became associated with his father, and that the gist of the conversations which she heard was that the senior Stoltz was to divide the net profits fifty-fifty with his son. There was no specific conversation about deducting operating costs; the father talked only about net profits. Frank Stoltz testified that in February 1947 he talked to his son about continuing to work for the Stoltzes and offered to give him half the profits on the cars he bought and sold. In describing the arrangement Frank Stoltz characterized the oral agreement as a partnership, but there was in fact no assumption of liabilities; there was nothing more than an agreement between Stoltz and his

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son to divide the profits on sales of cars made by plaintiff while the Stoltzes were absent in Florida during most of the winter.

With respect to the later formation of a corporation, the evidence shows that Frank Stoltz suggested incorporating Stoltz Motor Distributors for \$20,000.00; that he and plaintiff would put in \$10,000.00 each; that the cars in the sales lot at the time were worth about \$35,000.00; that \$10,000.00 worth of stock was to be issued, respectively, to Dollie Stoltz and to plaintiff, each of the parties to take fifty per cent of the profits; Anne Iden, the book-keeper, was to hold two qualifying shares. Plaintiff testified that he was supposed to pay \$10,000.00 into the company when it became incorporated; that he did not pay any money into it; that he had about \$10,000.00 coming at the time and did not make any offer or demand to acquire the \$10,000.00 worth of stock for himself. When he received a check for \$8,210.00 from Stoltz Motor Distributors on March 8, 1948, he did not offer to buy stock. Evidently nothing was paid into the corporation by plaintiff, and no stock was issued to him. However, the corporation took over the assets of the business previously conducted by the senior Stoltzes, including cars on hand, and a bank account of \$40,000.00 to \$50,000.00. After the incorporation the Stoltz Motor Distributors account still remained in effect; Dollie Stoltz owned 198 of the 200 shares of stock issued by Stoltz Motors, Inc. Steven C. Zidek testified that he

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prepared the incorporation papers and that plaintiff did not subscribe to any shares.

[27] The main point of the defense is that plaintiff used funds belonging to defendants for the purchase of automobiles, falsely reported the amounts paid for cars and thereby garnered to himself undisclosed profits; and that since plaintiff and defendants were not partners, plaintiff occupied the position of a fiduciary who is alleged to have betrayed his trust and is therefore not entitled to an accounting. As a matter of fact, this proceeding should not have been treated as a bill of accounting, because there is no dispute as to the accuracy of the amount due plaintiff, namely, \$10,116.83. The accountants for the respective parties found this sum shown to be due plaintiff on the books of the company. The suit should have been treated as an action in law, and judgment entered accordingly.

The bulk of the testimony is devoted to a recital by numerous witnesses called by defendants who testified with respect to the purchases and sales of used cars by plaintiff. This testimony is too voluminous to relate in detail, but we have carefully examined the evidence pertaining to the transactions involved, the more important of which may be summarized as follows. There is evidence that in June or July 1947 plaintiff sold two or three cars to one Goldstein of Moline, Illinois. This transaction was not reported to Stoltz Motors. Several cars were sold, yielding

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a profit to plaintiff and Frank Stoltz. Plaintiff testified that he took the money for the purchase of these cars from the safe, as he was authorized to do, and that his father told him that he should not put all the cars he bought and sold on the books. He also stated that there were between ten to twenty instances where he either bought or sold cars that were not listed on the books of the company, but that he reported these transactions to his father, gave him fifty per cent of the profits, and that no deductions for overhead or other expenses were made. Frank Stoltz, on the other hand, denied that his son had ever turned over any money not reported on the books of the business, either of the partnership or the corporation; denied that he had ever told his son to buy cars and not report the purchases to the bookkeeper; and further denied that he did not want a record made of the Goldstein transaction. Plaintiff testified that he obtained automobiles from Bernard Brothers, Inc., in the names of people who wanted them; that he received a commission for each transaction, of which he gave his father fifty per cent and retained fifty per cent for himself; that he bought some of the cars with currency taken from the safe; and that his father told him not to put all the sales on the books. There were out-of-town transactions as well. Plaintiff testified with respect to some forty or fifty automobiles sold to one Andersen of Viborg, South Dakota in 1947; he did not remember the details of all these transactions, but he

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stated that at all times he reported to the bookkeeper the exact amounts he received from Andersen. Plaintiff carried on several transactions with the Burlington Motors of LaGrange, operated by Hennebery and Mitchell; he testified that he correctly reported these purchases, both as to the amount paid and received on each sale. With respect to the Lynch Buick Automobile Company, Enness Motors of Milwaukee, Marquette Motors of Milwaukee, and Hennessy Motors of Milwaukee, plaintiff testified that he correctly reported every transaction, including the amount paid and received.

One of the transactions about which there is a dispute relates to the purchase of a Pontiac sedan from one Tschanz in February 1947. This was prior to the arrangement made between plaintiff and the Stoltzes for one-half of the profits. Similarly, a transaction with John Michalis preceded the profit-sharing agreement.

[253] The master concluded that although there were some discrepancies between the accounts reported, as they appear upon the cards of the plaintiff, ✓ there is no satisfactory evidence that plaintiff has withheld any monies of the defendants; that the peculiarities attending the business of buying and selling secondhand automobiles involved practices that might be questionable, but no sufficient evidence has been adduced to warrant a finding that the plaintiff has appropriated any monies to himself. ✓ Upon the whole, we think these conclusions are justified by the

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evidence. Some of the sales showed discrepancies of \$25.00 to \$50.00, others of larger amounts. It was admitted that in transactions of this kind there was often a third party involved who received a finder's fee, according to established policy in the trade. Since the accuracy of the amount of \$10,116.83 due plaintiff, as shown by the respective accountants' reports, is not questioned, the court should have entered judgment in favor of plaintiff for that amount, instead of entering a money decree for that sum, providing for the appointment of a receiver to liquidate the corporation in the event of the failure of defendants to pay the amount, and further providing for distribution of the balance of the funds of the partnership and the corporation. Accordingly, the decree of the Circuit Court is reversed, and the cause remanded with directions that judgment be entered in favor of plaintiff for \$10,116.83, the costs to be apportioned equally, one-half to be taxed against plaintiff Raymond G. Stoltz and one-half against defendants Frank and Dollie Stoltz.

DECREE REVERSED, AND THE CAUSE
REMANDED WITH DIRECTIONS: COSTS
TO BE APPORTIONED EQUALLY.

11 NIEMEYER, ^{P.}_A J., and BURKE, J., Concur.

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46027

EMERSON MIDWEST CORPORATION,
a corporation,

Appellant,

v.

EDWARD SLIVE, d.b.a.
WHOLESALEERS OUTLET, and
WHOLESALEERS OUTLET,

Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

351 I.A. 109¹

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION
OF THE COURT.

This is an appeal from an order quashing a capias
issued for the apprehension and arrest of defendant in
a civil action.

On May 14, 1952 plaintiff filed its statement of
claim in the Municipal Court of Chicago, alleging that
it and defendant had entered into written contracts,
called a "floor plan agreement," under which, as seller,
it delivered television sets to defendant, title to
which was retained in plaintiff until the entire purchase
price was paid in full; that the purchase price amounted
to \$7,681.28; that defendant made no payments; that
plaintiff made demand for the return of the sets, but
that defendant converted them to his own use, contrary
to the terms of the "floor plan agreement;" that malice
is the gist of the action, and prayed for a special
finding to that effect. Service was had on defendant,
and on July 18, 1952, a judgment for \$7,681.28 was
entered by Hon. Jay A. Schiller, one of the judges of

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the court. On July 30, 1952, plaintiff, without notice to defendant, moved, before Judge Oscar S. Caplan, to amended the judgment by adding a finding therein that "Malice is the gist of the action and that execution issue against the body of the defendant." The record shows this motion made by plaintiff, and following the motion, as shown in the record, are the words, "and the Court being fully advised in the premises sustained said motion." So far as appears, these are words of the makers of the record. No finding as to malice and no judgment are shown. A capias was issued August 1, 1952, defendant was apprehended September 24th, and on October 10, 1952, a petition to quash the capias was filed. This came on for hearing before Hon. Joseph A. Pope, who was sitting as the motion judge of the court. After a hearing, he entered the order quashing the capias pursuant to defendant's petition, from which order plaintiff appeals.

There is no finding or judgment in the record to support the capias. Nothing is shown, except that plaintiff made a motion to amend and that the motion was allowed. In Clark v. Augustine, 342 Ill. App. 296, decided by this court in 1951, plaintiff sued for slander and for assault and battery. Defendant failed to appear; the case was tried by the court without a jury; and a finding and judgment was entered against defendant in the sum of \$15,000. No finding of malice was made at that

time. Three months later the court entered an order nunc pro tunc, finding that malice was the gist of the action, and a body execution was issued. It was defendant's theory that as malice is the gist of an action for assault and battery, as well as for slander, it was unnecessary to make a special finding, and that the court retained jurisdiction to enter a nunc pro tunc order for the purpose of clarifying the record. It was held that even though the complaint states a case warranting such a finding, unless the judgment contains the special finding described by the statute, the capias cannot issue. While there is a distinction between that case and the instant one, in that there the term had expired, the fundamental requirement of a judgment order is applicable to this case.

The complaint here is not sufficient to support a finding that malice is the gist of the action. It alleges that no title passed, that defendant converted the goods, and that malice is the gist of the action, all of which are conclusions without supporting facts to make a case for a finding of malice. Before any person may be deprived of his liberty in a criminal case, great care and precision are required in all proceedings. Where the same result is sought in a civil action, certainly, no less should be required. A drastic remedy, such as imprisonment for a debt, ought not to be allowed by a court except upon presentation to it of facts which

reveal that the action is genuinely one in which malice is the gist. In this case, the complaint recites that plaintiff is the seller, and this in itself indicates that the transaction had in it the elements of a transfer of title. It then alleges a "floor plan agreement," without setting forth the terms of that agreement, either literally or in substance, merely asserting that plaintiff retained title until the entire purchase price was paid; that is to say, if there was one dollar left on the purchase price, defendant would still be guilty of conversion. The complaint is so wholly inadequate in this respect that the issuance of a capias pursuant to it was clearly erroneous.

It is urged that defendant having defaulted, he impliedly admitted he had no defense. However, where, as here, the complaint makes no case against defendant insofar as the issue of malice is concerned, that point could have been raised even in a reviewing court. Where, as here, it does not appear that there was any judgment order finding malice, it is proper to consider the inadequacy of the complaint upon a petition to quash the writ. Roe v. County of Cook, 358 Ill. 568.

Plaintiff contends that the matter should have been submitted to Judge Caplan and that it was error for Judge Pope to enter the order. It is apparent from the record that all that occurred prior to the entry of the order

appealed from was purely perfunctory and ex parte. Under these circumstances, the judge assigned to hear motions, in accordance with the practice of the Municipal court, could properly sit as the judge to hear the petition and enter the order in question. Fessler v. Weiss, 348 Ill. App. 21.

Order affirmed.

Tuohy and Robson, JJ., concur.

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351 I.A. 109²

LOUIS BOURJAILY and RUTH BOURJAILY,
co-partners, doing business as
BOURJAILY & ASSOCIATES,

Appellees,

v.

A. R. MASEK,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Louis Bourjaily and Ruth Bourjaily, co-partners, doing business as Bourjaily & Associates, filed a complaint in the Superior Court of Cook County against A. R. Masek for damages for loss of profit based on an alleged breach of contract. Defendant filed a counterclaim. Issues were joined. In a trial before the court without a jury judgment was entered for plaintiffs for \$7,195 and against defendant on the counterclaim. Defendant, appealing, prays that the judgment against him be reversed and that judgment be entered for him on the counterclaim.

The complaint alleges that defendant owned and published a neighborhood newspaper called "The Lawndale News" and that plaintiffs entered into a written agreement with defendant wherein they were appointed exclusive representatives for the sale of help wanted advertising in the paper; that they agreed to use a full page each week at the rate of \$65 per page and at the rate of \$10 per column whenever six columns or less were used by them; that the agreement was dated June 30, 1944; that the term of the

contract was for the duration of the "present war" or for one year, whichever should be shorter; that on February 2, 1945, the defendant, without reasonable cause, terminated the agreement; and that after February 2, 1945, defendant refused to accept any advertising obtained by plaintiffs, by reason whereof they suffered damages in the amount of \$25,000. Defendant in an amended answer averred that prior to February 2, 1945, plaintiffs employed and used false and fraudulent tactics and practices in submitting for publication unauthorized advertisements to be placed in the newspaper, which worked a fraud upon the defendant; that complaints were filed against him with the State's Attorney and the Better Business Bureau by various persons, firms and corporations, who charged that they were victims of the tactics and practices used by plaintiffs; and that plaintiffs used false and fraudulent tactics and methods in attempting to collect for advertisements placed by them in the paper. Defendant denied that he refused to accept or print any advertisements obtained by plaintiffs for publication in the newspaper and asserted that no advertisements were offered by plaintiffs for publication subsequent to February 2, 1945. Defendant also alleged that the contract was terminated and rescinded by mutual consent of the parties. In a counterclaim the defendant asked \$25,000 in damages because of the false and fraudulent tactics allegedly employed by plaintiffs in soliciting advertising and attempting to collect therefor. Plaintiffs denied the allegations of the counterclaim and in reply

to the answer denied that the contract was terminated by mutual consent and also denied that no advertisements were offered by plaintiffs for publication subsequent to February 2, 1945.

Defendant published a neighborhood newspaper known as "The Lawndale News." Under an oral agreement made in March, 1944, plaintiffs sold "help wanted" advertising in the newspaper. In June, 1944, the parties entered into the written agreement set out in the complaint, under which plaintiffs were appointed exclusive representatives for the sale of help wanted advertising in the paper. Plaintiffs were to defray all expenses of securing business and agreed to use their best efforts to secure the advertising and to pay defendant at the rate of \$65 a page and \$10 a column whenever six columns or less were used. Defendant ran two types of advertising in his newspaper. One was known as display advertising and consisted of general advertising copy and the other was known as classified advertising and included help wanted ads, offers of property for sale, etc. Only help wanted advertising was to be solicited by plaintiffs. After the execution of the written agreement plaintiffs continued to solicit help wanted ads for the paper and the defendant published them. In November and December, 1944 and January, 1945, defendant received complaints from various corporations that help wanted ads for them were being run in the newspaper without authority of the purported advertisers. Defendant requested the

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1. The first part of the report deals with the general situation of the country, and the progress of the various branches of industry and commerce. It is found that the country is generally prosperous, and that the various branches of industry and commerce are all making rapid progress.

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3. The third part of the report deals with the state of the various branches of industry and commerce. It is found that the various branches of industry and commerce are all making rapid progress, and that the country is generally prosperous.

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6. The sixth part of the report deals with the state of the various branches of industry and commerce. It is found that the various branches of industry and commerce are all making rapid progress, and that the country is generally prosperous.

7. The seventh part of the report deals with the state of the various branches of industry and commerce. It is found that the various branches of industry and commerce are all making rapid progress, and that the country is generally prosperous.

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9. The ninth part of the report deals with the state of the various branches of industry and commerce. It is found that the various branches of industry and commerce are all making rapid progress, and that the country is generally prosperous.

10. The tenth part of the report deals with the state of the various branches of industry and commerce. It is found that the various branches of industry and commerce are all making rapid progress, and that the country is generally prosperous.

plaintiffs to refrain from using unethical methods in obtaining ads. Defendant also received complaints from the State's Attorney's office and the Better Business Bureau. He states that he notified plaintiffs that the contract would be terminated if they continued to place fictitious ads. A great many letters were received by defendant complaining about ads being run in the newspaper without authority. On February 2, 1945, defendant wrote a letter to plaintiffs terminating the agreement and requesting them to refrain from soliciting any ads for the newspaper. Despite the notice of termination defendant testified that he never refused to run any ads tendered to him by plaintiffs and that he ran ads for them during the months of February, March, April, May and June, 1945. Mrs. Bourjaily admitted that she did not tender any ads which he refused to run. Plaintiffs did not deny defendant's testimony that he ran ads for them during the period from February to June, 1945. Defendant testified that neither he nor his employees solicited any help wanted ads for The Lawndale News. Defendant sold the newspaper in July, 1945.

We turn to a consideration of defendant's contention that he had the right to cancel the contract because of plaintiffs' misconduct. Plaintiffs insist that the contract was canceled without justifiable cause. As to defendant's statement that although he had ample cause to cancel the contract he ran ads for the plaintiffs in February, March, April, May and June, 1945 and that he never refused

to run any ads placed by them in that period, plaintiffs assert that the defendant is not in a position to urge this defense as it was not raised in the trial. During the trial the then attorney for defendant asserted two defenses, first, that the contract was terminated because of acts of misconduct by the plaintiffs, and second that despite the acts of misconduct the parties agreed to terminate the contract. On motion of plaintiffs, defendant elected to stand on the defense of termination for cause and that no damages were suffered. In view of the election of defendant, we shall consider only the defense that defendant had the right to cancel the contract. That is the issue on which the case was tried.

Under the law it was the duty of plaintiffs to carry out the obligation of the contract honestly and in good faith. The overwhelming weight of the evidence established that plaintiffs were guilty of fraud in continually submitting fictitious help wanted ads to be run in The Lawndale News. A reasonable inference from the evidence is that plaintiffs were lifting ads from Chicago newspapers and inserting them in defendant's publication. Plaintiffs sent invoices for these ads. The misconduct of plaintiffs caused complaints to the Better Business Bureau, the State's Attorney and to defendant. The latter complained to plaintiffs on various occasions about the practice of submitting fictitious ads. The uncontradicted evidence shows that numerous complaints were received by defendant after conversations between the parties concerning the misconduct.

Letters from various corporations dated January and February, 1945, received in evidence, complained about being billed by The Lawndale News for ads which were run in the paper without authority. We find that the evidence proves conclusively that plaintiffs were lifting ads from other newspapers and running them without authority and that this misconduct, particularly after being warned, was ample justification for the cancellation of the contract. The court erred in entering judgment for plaintiffs. Ebbert v. Metropolitan Life Insurance Co., 369 Ill. 306, 309.

Defendant states that the trial judge erred in refusing to enter judgment in his favor on the counterclaim and asks that we enter judgment thereon. We agree with the trial judge that defendant failed to prove damages because of the misconduct of plaintiffs. The judgment of the Superior Court of Cook County is reversed and the cause is remanded with directions to enter judgment for defendant and against plaintiffs on the case in chief and for the plaintiffs and against defendant on the counterclaim.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

NIEMEYER, P.J. AND FRIEND, J. CONCUR.

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351 I.A. 110

J. R. T. ALFORD,

Plaintiff below,

Appellee,

v.

BUTLER BUILDING, INC., a corporation,
and JAYNER, INC., a corporation,

Defendants below,

Appellees,

On Appeal of OSCAR MANCHIK,

Intervening Petitioner below,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff, J. R. T. Alford, as successor trustee, instituted suit to foreclose the lien of the trust deed executed in 1936 by Butler Building, Inc. to secure junior mortgage 6% leasehold bonds in the sum of \$1,141,000 of which \$1,129,000 remain outstanding. The premises described in the trust deed are improved with a sixteen-story building located at 162-70 North State Street in the City of Chicago, Cook County, Illinois. The first mortgage on the premises in question having been fully paid, the junior mortgage leasehold bonds on which the instant proceeding is based are a first lien.

Defendant Jayner, Inc., the record owner of the leasehold estate and building, filed a counterclaim proposing a plan of reorganization. After a series of hearings the

trial court entered an order finding that the terms of the proposed plan were equitable, and authorized submission of the proposed plan to the bondholders for approval. From this order Oscar Manchik, an objector to the proposed plan of reorganization, appeals.

Jayner, Inc., an Illinois corporation, was organized for the purpose of carrying out the plan of reorganization. It has an authorized capital stock of 12,000 shares of the par value of one dollar a share, of which 11,129 shares were issued and held under the same terms as govern the stock of Butler Building, Inc. Butler Building, Inc., like its successor Jayner, Inc., was organized for the purpose of acquiring all the property of another corporation which at that time owned the leasehold estate here involved, in accordance with the plan for readjustment of a mortgage debt made in 1933. Pursuant to that plan, all the stock of Butler Building, Inc. was deposited with The Northern Trust Company, where it is held under the terms of an escrow agreement. This agreement does not appear in the record. Before the filing of the present action Butler Building, Inc. conveyed the leasehold estate subject to the trust deed to Jayner, Inc.

The proposed plan of reorganization provides in substance that new fifteen-year bonds bearing interest at the rate of three per cent per annum be secured by a first lien on the property of a new corporation. In the event the bondholders' nominee is successful bidder at the foreclosure

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sale, the equity ownership of the corporation will be in the participating bondholders. Nonparticipating bondholders will receive in cash pro rata distribution of the purchase price. According to the pleadings about eighty-five per cent of the holders of the old bonds requested that the proposed plan be approved by the court.

In this court Manchik filed a common-law record. After Manchik filed his brief the plaintiff successor trustee, defendants Butler Building, Inc., and Jayner, Inc., and certain bondholders holding \$706,100 of the old bonds who were made additional parties as counterdefendants to the counterclaim filed by Jayner, Inc., joined in filing a motion to dismiss the appeal on the ground that the order appealed from is interlocutory in character. This motion was denied. In their reply brief the same parties renewed their motion to dismiss the appeal. Since this motion challenges the jurisdiction of this court, it may be raised at any time during the pendency of the proceedings. (Nye v. Nye, 411 Ill. 408.) To the same effect see Anderson v. Samuelson, 340 Ill. App. 528. The right of appeal is created by statute and in the absence of statutory authority therefor an interlocutory appeal entered in the progress of the case is not appealable. (Steele v. Mularkey, 345 Ill. App. 412.) In the present proceeding no decree of foreclosure has been entered nor has a sale been had. The order appealed from approves the terms and conditions of issuance and exchange of new securities under a proposed plan of reorganization conditioned upon the submission of the plan to the bondholders

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for their approval. According to the provisions of the plan as shown in the counterclaim of Jayner, Inc., the plan may be altered or modified with the approval of the court after its submission for acceptance if in the opinion of the court the alteration or modification does not materially or adversely affect the interest of the bondholders. In these circumstances it cannot be said with certainty that the bondholders will approve the plan. Moreover the question as to the amount to be bid for the property by bondholders desiring to participate in the plan is left open for future determination. It may well be that the bid of the nominee for the depositing bondholders will not be the highest received at the sale.

So far as the record shows the order appealed from has not determined anything relating to the merits of the controversy and in our opinion is not a final order within the meaning of Section 77 of the Civil Practice Act. We are, therefore, impelled to dismiss the appeal.

For the reasons given, the appeal is dismissed.

APPEAL DISMISSED.

FEINBERG, P.J. AND KILEY, J., CONCUR.

46013

JENNIE GOLDMAN, ISAAC MARKS
& COMPANY, a corporation,
GEORGE TEMPLAR, and KELLERS
DELIVERY SERVICE, INC., a
corporation,

Appellants,

v.

CITY OF CHICAGO, a municipal
corporation,

Appellee.

241 X
351 I.A. 111¹

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

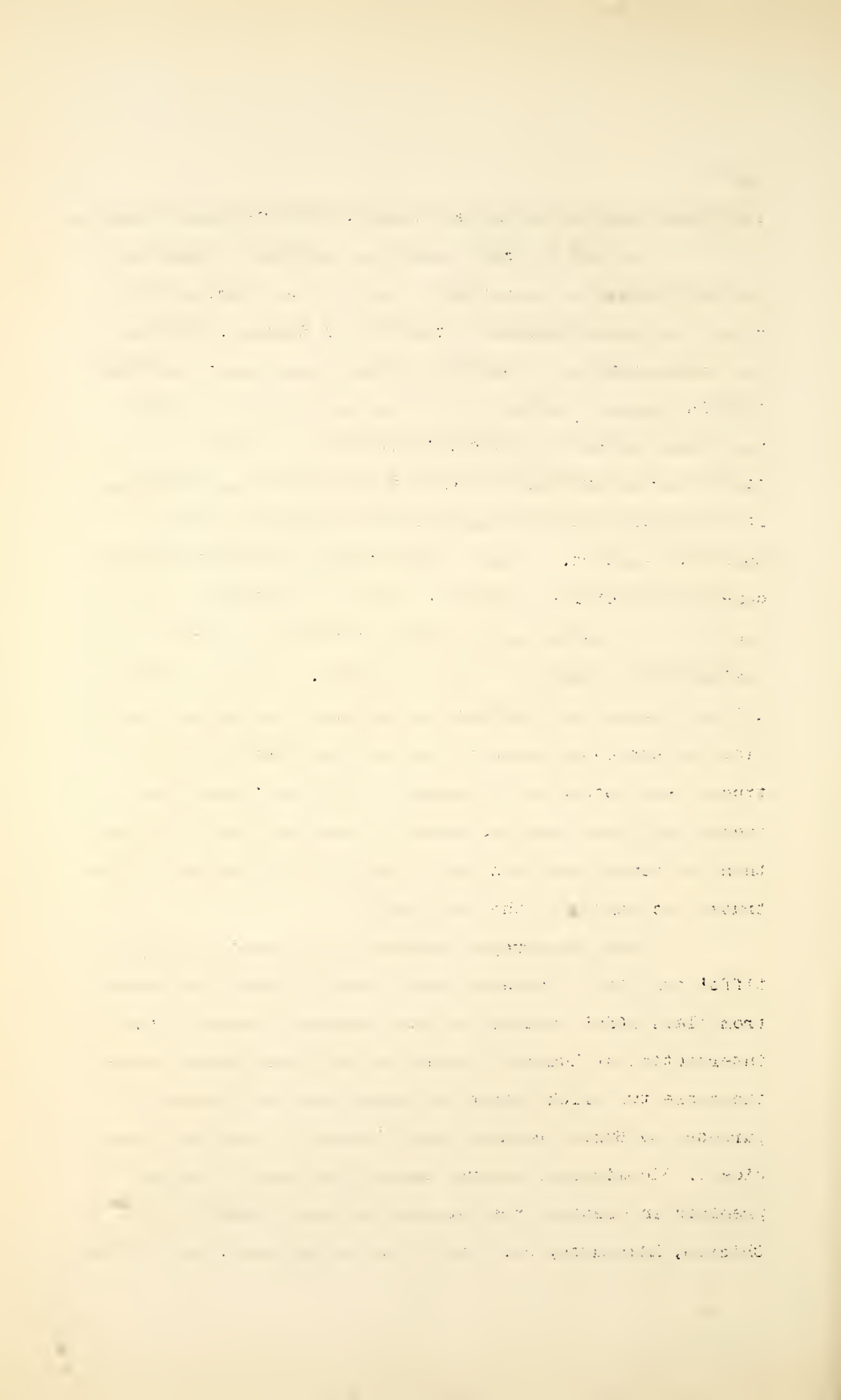
Plaintiffs appeal from an order entered at the close of plaintiffs' evidence dismissing their complaint praying for a declaratory judgment finding that plaintiff Kellers Delivery Service, Inc., a corporation, hereinafter called "Kellers," has a right to operate its business as a legal nonconforming use in a district zoned for apartments under the provisions of the zoning ordinances of the City of Chicago as amended.

The material facts are these. Plaintiff Jennie Goldman is the owner of the premises improved with a one-story mill-constructed garage-type building located at the northeast corner of Humboldt Boulevard and Bloomingdale Avenue in the City of Chicago, Cook County, Illinois. This building was erected in 1923. For six years thereafter it was used as a garage and automobile sales agency. During this period automobile repair work was done on these premises. From about 1929 until 1942 the premises in controversy were used as a public or private garage, and from 1942 to 1948

they were occupied by another tenant, Stewart-Warner Company.

In 1948 Kellers leased the premises in question for the purpose of operating a home delivery service for retail appliance dealers in the City of Chicago. Kellers own and operate eight Chevrolet trucks each about fourteen feet in length. Merchandise is conveyed from the retail appliance dealers by Kellers to its garage where it is stored for an average period of about two weeks, whereupon it is delivered to the homes of the customers of retail appliance dealers. A small percentage of Kellers' business comes from factories outside of the City of Chicago and is hauled in by trucks ranging from twelve feet in length to semitrailers twenty-five feet in length. In 1939, before Kellers leased the premises, an enclosed loading dock and platform was constructed in the building where all the trucks were loaded and unloaded. About ten trucks are docked daily and only occasionally does any truck make more than one round trip each day. During the nighttime all the trucks are parked in the building.

From photographs received in evidence as plaintiffs' exhibits it appears that directly across the street from plaintiffs' premises on the northwest corner of the intersection of Humboldt Boulevard and Bloomingdale Avenue there are two brick garage buildings used for storage purposes by Bunte Brothers Candy Company. Along the south side of Bloomingdale Avenue across the street from the premises in question are elevated railroad tracks of the Chicago, Milwaukee, St. Paul & Pacific Railroad, and on the



east side of Humboldt Boulevard adjoining the railroad tracks on the south there appears a two-story brick building. The first floor of this building is occupied by a delicatessen store with living quarters above it. The other structures shown in the photographs appear to be apartment buildings.

When the building occupied by Kellers was erected in 1923 the premises were zoned for commercial purposes. Among the uses permitted in such a district provided for in Section 8 of the zoning ordinance was an automobile repair shop, public garage, automobile ~~fuel~~ or service station, railroad or water freight station, or storage, team, loading or unloading track, or private track or wharf. Other uses provided for in Section 8 of the Chicago zoning ordinance of 1923 are retail store, retail trade, vocation, profession or shop, for custom work or the making of articles to be sold at retail on the premises to the ultimate consumer; storage in warehouse of materials or products; provided the operation of such store, trade, vocation, profession, shop, or storage, does not involve the handling of materials, products or articles across public sidewalks in front in sufficient and considerable amounts so as to interfere with the free, safe and continuous passage of pedestrians along the sidewalk or interfere with the usual functioning of adjacent streets and alleys.

December 3, 1942 the City Council of the City of Chicago passed a comprehensive amendment to the Chicago

zoning ordinance rezoning the premises here in question from that of a commercial district to that of an apartment district. The amendatory Chicago zoning ordinance also contains a provision which reads:

"Nonconforming uses: Any lawful use of the property on the effective date of this ordinance, which by virtue of its provisions is a nonconforming use, is permitted after this ordinance becomes effective subject to the following limitations:

(a) A nonconforming use not authorized by virtue of the Chicago zoning ordinance in effect at the time this ordinance becomes effective, shall be discontinued and not reestablished.

(b) If a nonconforming use has been discontinued for a period of two years or more it shall not be reestablished unless the nonconforming use was in a building designed, arranged and intended for such use."

Plaintiffs contend that Kellers' use of the premises in question constitutes a lawful nonconforming use.

Defendant argues that plaintiffs have failed to prove that the present use of the property is the same as it was prior to the passage of the amendatory ordinance in 1942.

Where, as here, a motion is made to dismiss the complaint at the close of plaintiffs' testimony, the motion is in the nature of a demurrer to the evidence, and in ruling upon the motion it is the duty of the court to consider the testimony in the light most favorable to the plaintiffs. See Fewkes v. Borah, 376 Ill. 596. In the instant case the evidence shows that before the adoption of the amendatory ordinance the premises involved were used as a public garage and that some of the patrons stored their merchandise in the garage. It is undisputed that the loading dock constructed in 1939 was designed to facilitate the handling of goods and merchandise from trucks. We think an inference could be

The first part of the report deals with the general situation of the country and the progress of the work during the year. It is followed by a detailed account of the various projects and the results achieved.

The second part of the report deals with the financial situation of the organization. It gives a detailed account of the income and expenditure for the year, and shows how the funds have been used for the various projects.

The third part of the report deals with the personnel of the organization. It gives a detailed account of the staff and the work done by each of them, and shows how the organization has been able to carry out its work with such efficiency.

The fourth part of the report deals with the future of the organization. It gives a detailed account of the plans for the next year, and shows how the organization is prepared to meet the challenges of the future.

The fifth part of the report deals with the conclusions of the year. It gives a detailed account of the achievements of the year, and shows how the organization has been able to carry out its work with such efficiency. It also gives a detailed account of the challenges faced by the organization, and shows how it has been able to overcome them.

fairly drawn from plaintiffs' evidence that at the time the ordinance was amended goods and merchandise were not only transferred at the loading dock from one vehicle to another but also stored in the premises.

Defendant asserts that Kellers are operating "a small truck terminal." The evidence does not show that the conduct of Kellers' business subjected the premises in question to a use substantially different from their use at the time the amendatory ordinance was adopted. Nor is there any evidence tending to prove that the operation of Kellers' business interfered with the free, safe and continuous passage of pedestrians along the sidewalk at the premises in question or the usual functioning of adjacent alleys and streets. Under the original zoning ordinance storage and trucking were a permitted use. Since there is some evidence tending to show that the premises were so used at the time of the adoption of the amendatory ordinance in 1942 it follows that Kellers' use of the premises was a lawful non-conforming use under the provisions of the amended ordinance relating to nonconforming uses. In the view which we take of this case it is unnecessary to consider the other points raised.

In the present state of the record we are impelled to reverse the order dismissing the complaint and remand the cause for further proceedings.

For the reasons given, the order is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.

FEINBERG, P.J. AND KILEY, J. CONCUR.

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Abstract

Gen. No. 10671

Agenda No. 4.

IN THE 351 I.A. 111²
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
MAY TERM, A. D. 1953.

IN THE MATTER OF THE ESTATE)
OF MATILDA JOHNSON, Incompetent,)
On Appeal of Ernest G. Miessler,)
Conservator of the Estate of)
Matilda Johnson, Incompetent,)
Ernest G. Miessler, Appellant.)

Appeal from the
Circuit Court of
Du Page County.

WOLFE,-- J.

On or about the 13th day of January 1949, Matilda Johnson purchased several U. S. Savings Bonds, Series "E," which were issued in the name of Matilda Johnson or Alice M. Glemaker, as co-owners. On October 20, 1949, a petition was filed in the Probate Court of Du Page County to have Matilda Johnson declared incompetent. On February 3, 1950, an order was entered in the probate court finding that said Matilda Johnson was incompetent, and appointed Ernest G. Miessler as conservator of her estate. This order was entered nunc pro tunc as of October 27, 1949.

On November 2, 1949, Alice M. Glemaker received a letter from Ernest G. Miessler, as conservator of the estate of

IN THE
APPELLATE COURT OF THE STATE
OF NEW YORK
SECOND JUDICIAL DISTRICT
WEST YORK, N. Y. 1953.

IN THE MATTER OF THE ESTATE
OF WILLIAM JOHNSON, Incompetent,
On Appeal of Ernest G. Messaler,
Conservator of the Estate of
William Johnson, Incompetent,
Applicant.

WOLF, --- J.

On or about the 15th day of January 1953, WILLIAM
JOHNSON purchased several N. Y. Savings Bonds, Series 1234
which were issued in the name of WILLIAM JOHNSON of ALICE N.
JOHNSON, as co-owners. On October 30, 1952, a petition was
filed in the Probate Court of the West County to have WILLIAM
JOHNSON declared incompetent. On February 3, 1953, an order
was entered in the probate court finding that WILLIAM
JOHNSON was incompetent, and appointed Ernest G. Messaler as
conservator of his estate. This order was entered upon two
days as of October 27, 1952.
On November 5, 1952, ALICE N. JOHNSON received a
letter from Ernest G. Messaler, as conservator of the estate of

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Matilda Johnson, in which he requested Alice M. Glemaker to cooperate with him as such a conservator and turn over to him assets in which the incompetent had an interest. Alice M. Glemaker delivered the bonds to the conservator and got a receipt from him for said bonds. On November 16, 1949, Ernest G. Miessler, as such conservator cashed the savings bonds in the name of Matilda Johnson or Alice M. Glemaker. At this time no inventory had been filed in the Estate of Matilda Johnson and no order of Court had been entered authorizing the conservator to cash these bonds. On March 2, 1950, an inventory was filed by the conservator setting forth as Item 14 the receipt of \$3,999.00 for redemption of U. S. Government Savings Bonds. On December 31, 1950, the conservator filed his first report in which he set forth that on November 17, 1949, he received the principal sum of \$3,975.00 for the redemption of these Series "E" Government Bonds. On Jan. 14, 1952, Matilda Johnson died. On April 14, 1952, Alice M. Glemaker filed a petition in the probate court for the payment to her of the proceeds of these bonds. The probate court granted the petition and ordered the money paid to Alice M. Glemaker. The conservator prayed an appeal to the Circuit Court of Du Page County. The case was heard upon the pleadings and report, and the Court thereupon decided the case in favor of Alice M. Glemaker and ordered the conservator to pay her the amount that he had received for the government bonds. The conservator has appealed that decision to this court.

evidence presented, in which the respondent, Alice M. Johnson, is
 concerned with the fact that she was a defendant in the case of
 the same in which the respondent was an interested party. Alice M.
 Johnson's testimony was taken in the court room and was a
 positive fact in the case. On October 12, 1900, James
 D. Wheeler, as such commissioner created the records which in
 his case of Alice Johnson was taken in the court room. In his
 case no inventory was taken in the case of Alice
 Johnson and no other of those had been entered into the
 a computer by the state books. On March 2, 1900, the
 inventory was filed by the computer which was taken in the
 if the record of 1899, the respondent of J. E. Johnson.
 James Johnson. On December 21, 1899, the computer filed
 his first report in which he set forth the list of October 12,
 1899, he received the official list of 1899, in the
 registration of those before the respondent. On April 10,
 1900, Alice Johnson died. On April 10, 1900, Alice M.
 Johnson filed a petition in the probate court for the
 first return of the proceeds of the same. The probate
 court granted the petition and issued the same and the
 Alice M. Johnson. The computer set on the record in the
 official books of the probate court. The same was taken from
 the probate and report, and the probate court decided
 the case in favor of Alice M. Johnson and ordered the de-
 posit to be paid to the amount that he had claimed for the
 respondent. The computer has received that decision
 as his case.

[Sons of Ill. State Ann. 110.371]

3.

Section 274 of Chap. 3 of the Illinois Revised Statutes relative to the powers and duties of the conservator is in part as follows: "The conservator of the estate under the direction of the court shall have the care, management and investment of the ward's estate, and under the direction of the court he shall manage the estate of his ward frugally and shall apply the income and profits thereof so far as they may be necessary for the comfort and suitable support and education of the ward, his children, including children by adoption, and persons related by blood or marriage who are dependent upon, or entitled to support from him. When authorized so to do by the court for the comfort and suitable support and education of the ward, his children, including children by adoption, and persons related by blood or marriage who are dependent upon, or entitled to support from him, the conservator may make disbursement of his ward's funds directly to the ward or persons claiming through him or to the person to whom the ward, or persons claiming through him, or the ward's estate may become indebted, and be entitled to credit therefor in his accounts the same as if he had himself applied the sums for those purposes. If the income and profits from the estate are insufficient for these purposes the conservator may use such portion of the corpus of the estate as the court orders from time to time."

The facts in this case are not in dispute. The question involved is, can a conservator without any order of Court, convert property of his ward and another co-owner into

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cash, then claim the fund as part of the deceased ward's estate, when, if it had not been converted it would have been the property of the co-owner? The appellant has cited numerous cases which hold that the conservator succeeds to the rights of his incompetent. No doubt in many circumstances this is a correct statement of law, but in others it is not. Suppose that instead of the conservator cashing these bonds as he did without any order of Court, he had sold real estate belonging to his ward without the order of the Court, could it then be said that by his unlawful conversion of this real estate, he could defeat the rights which people had in the real estate before its unlawful conversion? As before stated, our statute defines the powers and duties of a conservator and we find nothing in that section of the statute which gives the conservator the right to convert a ward's property from one kind to another, without first getting the sanction of the Court.

The federal law no doubt gives the right to joint owners of bonds such as these (when they are made payable to Matilda Johnson or Alice M. Glemaker) to cash the bonds, and when presented by either of the co-owners the party cashing them is protected under the law. The appellant relies strongly upon the case of Manta vs. Kahl, 348 Ill. App. 373. This case involves a joint bank account and the bank had paid one of the joint depositors the amount of the deposit. The deposit was made under the particular rules of the bank, and the parties both signed the same. One of the parties became an incompetent and a conservator was appointed for him. The conservator withdrew the account, and the other joint holder sued the bank for the amount of the deposit, claiming that it was

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unlawfully withdrawn. There was no attempt made to hold the conservator liable for the amount of the joint account, as it is in the case that we are now considering, so we do not think it is authority, in any way as would sustain the contention of the appellant in this suit.

In the case of *Lewis vs. Hill*, 317 Ill. App. 531, Sarah E. Collins had devised certain real estate to Edith Otter Lewis. Later Sarah E. Collins was adjudged incompetent and T. C. Hill was appointed her conservator. Sarah E. Collins was an aged lady past ninety years and was residing in a home for the aged. Under the order of the county court the real estate devised to Edith Otter Lewis was sold by the conservator and no question raised about the legality of the sale. Later Sarah Collins died and her will was admitted to probate and Hill was appointed executor of the will. He filed his report as conservator showing a balance on hand of \$1,752.40, which he turned over to himself as executor. Edith Otter Lewis started a suit in the Circuit Court of Douglas County to recover from Hill the sale price of the real estate, as this was not used for the support and maintenance of Sarah E. Collins during her lifetime. The Court on passing upon the merits of the controversy uses this language: "We believe that on the facts of this case, plaintiff is entitled to prevail. None of the funds received from the sale of the Atwood property were used for the support of Sarah E. Collins and we do not believe that the mere fact that there has been a conversion from real estate to personalty which did not benefit the

testator should defeat her intention expressed in her will. Nor do we believe that a conservator of an insane person should be permitted to revoke the express provisions of a testator's will made at the time the testator had mental capacity to make the same. Such a conversion has been held insufficient to defeat a contrary expressed intention of the testator where the sale was made by the testator himself. *Adams v. Peabody Coal Co.*, 230 Ill. 469; *Heirs of Wright v. Minshall*, 72 Ill. 584. Because the funds from the sale of the Atwood property can be traced and because it is clear that no part of them were used for the benefit of Sarah E. Collins, we hold that they are impressed with a trust in the hands of the executor and upon distribution of the estate should be paid to plaintiff under the provisions of the will of Sarah E. Collins."

Ernest Meissler as conservator did not need to redeem these bonds for the support and maintenance of his ward, but he did it of his own volition. There is no question but that Alice M. Glemaker can trace the money derived from these bonds into his hands as executor, and it is our conclusion that the Circuit Court properly held that she was entitled to the proceeds of these bonds. The judgment of the Circuit Court should be affirmed.

Judgment affirmed.

Journal of Interpersonal Violence 26(10)

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1. The first step is to identify the problem or question that needs to be answered.

Journal of the American Statistical Association

3613 A
351 I.A. 134

Abstract

Gen. No. 10675

Agenda No. 12

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
MAY TERM, A. D. 1953

ADDIE HIGGS,	} Plaintiff-Appellant,)	Appeal from
vs.		Circuit Court,
LESLIE HIGGS,		Lee County.
) Defendant-Appellee.)	

ANDERSON -- J.

In 1943 Addie Higgs, plaintiff-appellant, obtained a divorce from her husband, Leslie Higgs, defendant-appellee, in the Circuit Court of Lee County. By the decree she was awarded \$100.00 a month alimony for the support of herself and three minor children. In 1952 the defendant filed a petition asking the court to reduce his alimony. Shortly thereafter the plaintiff filed a petition to increase the alimony. A hearing was held on these petitions before the Chancellor. Testimony of the two parties was heard and the Chancellor entered a supplemental decree dismissing the petition of the plaintiff and reducing the payments of alimony to \$65.00 a month. Plaintiff has appealed from this order.

Defendant has filed no brief and argument in the Appellate Court. Under our rules we must dispose of the case regardless of this. The absence of defendant-appellee's brief places an undue hardship on this court, as in a

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sense we are required to represent the defendant.

There is no material dispute in the testimony of the parties. The testimony discloses that at the time the divorce was granted the defendant was earning about \$4800.00 a year; that he now earns about \$6700.00 per year; that at the time of the divorce the three children were minors; that two of the children are now of legal age and are self-supporting; that the youngest child, David, now nineteen years of age, lives with his mother; that by agreement of the parties and as provided by the decree of divorce, the defendant deeded the plaintiff the homestead then worth about \$6000.00; that since then she has sold this and has purchased another home of less value; that the defendant has remarried. It further appears from the testimony that defendant's standard of living has improved since the time the divorce was granted. There is no testimony disclosing that he is not financially able to pay at least the \$100.00 a month which he had been paying.

Addie Higgs testified that for some years after the divorce she was in fair health and was employed, earning about \$20.00 a week, but due to her present poor health she has not been able to work for the last five years except for a little baby sitting; that she has had no other income during this period except the alimony payments; that she has been to the Mayo Clinic and they and her doctor recommend for the sake of her health that she go to Arizona to live; that she does not know what her expenses will be out there; that she now receives no assistance from her children; and that her actual living expenses now amount to about \$140.00 per month.

Plaintiff contends that she is entitled to \$140.00 a month to support her and her minor son and that defendant is financially able to pay that sum. Defendant contends that the amount should be decreased, since plaintiff now only needs to support herself and one child.

Section 19 of the ~~Divorce~~ Act (Ill. Rev. Stat., 1951, ch. 40, par. 19) provides in part that "the court may, on application, from time to time, make such alterations in the allowance of alimony and maintenance, and the care,

There is no material change in the testimony of the parties.

Testimony of the parties at the time the divorce was granted is that the defendant was earning about \$100.00 a year; that he was about 40 years of age; that at the time of the divorce the three children were about 10, 8 and 6 years of age; that the children are now of legal age and are self-supporting; that the youngest child, now, is about 10 years of age; that the defendant is now a member of the family of the father of the children; that since the plaintiff the defendant has not earned more than \$100.00 a year; that then she has sold this and has purchased another house of less value; that the defendant has remarried. It further appears from the testimony that defendant's statement of living is correct since the time the divorce was granted. There is no testimony indicating that he is not financially able to pay at least the \$100.00 a month which he has been paying.

Little else is testified that for some years after the divorce he was in fact living with his wife, earning about \$100.00 a week, but she has purchased poor health and has not been able to work for the last two years except for a little help with her house and has no other income; that she has spent the last year or so of her life in the hospital; that they had been doctor recommended for the sake of her health; that she is to be taken to live; that she does not know what her income will be and that, that she now receives a no benefit from her disability and that her actual living expenses are not more than \$100.00 a month.

Plaintiff contends that she is entitled to \$100.00 a month for support; that she has not been able to work since the divorce; that she is now dependent on her husband for support; that she is now only able to support herself and her child.

Section 19 of the divorce act (Ill. Rev. Stat., 1911, ch. 11, sec. 19) provides in part that "the court may, on application, from time to time, make such alterations in the allowance of alimony and maintenance, and the care,

custody and support of the children, as shall appear reasonable and proper."

It has been stated that where a divorce decree is sought to be modified under the above statute, the question for the court to determine is not whether the payments were adequate when the decree was entered, but whether the necessities of the wife and her children require an increase and whether the husband is financially able to pay. (Smith vs. Smith, 334 Ill. 370)

Jacobs vs. Jacobs, 328 Ill. App. 133, involved a petition by a wife for an increase in alimony for the support of herself and children. The facts in this case disclose that the wife's income had decreased and the husband's had increased after the decree was granted. The Appellate Court held that the trial court was in error under the facts in denying the increase, and says on page 142 of the opinion:

"We think any decrease in the wife's income, whether due to the payment of income taxes or to any other reason which reduces her income beyond what is necessary for her station in life may be considered. (Russell v. Russell, 142 F. (2d) 753, at page 754.)"

In Arnold vs. Arnold, 332 Ill. App. 586, the Appellate Court affirmed an order of the trial court increasing payments of alimony after the decree was entered on the grounds of need for additional money for support of the wife. The court said in substance that the original decree only determined the amount necessary to maintain the wife in the station in life to which she was accustomed at that time. The husband's increased income and his better standard of living of itself would not permit an increase. The law would not require him to maintain his wife in the same standard as he had attained by reason of additional wealth. The case further held that the wife was entitled to an increased allowance to maintain her in the same style to which she was accustomed at the time of the separation, and the husband would have to pay it, since he was financially able to do so.

Applying the facts in the instant case to the law as above announced, it appears that the sum of \$65.00 per month is wholly inadequate to support

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1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The second is the fact that the majority of the population is now living in the middle class. This is a result of the process of social mobility, which has been going on since the beginning of the 20th century. The third is the fact that the majority of the population is now living in the white middle class. This is a result of the process of racial integration, which has been going on since the beginning of the 20th century.

[illegible]

THE UNIVERSITY OF CHICAGO

the plaintiff according to her standard of living at the time the divorce was granted. The court will take judicial notice of the fact that the purchasing power of a dollar has depreciated nearly fifty percent since the time this decree was entered. Although it is true that she has been relieved of the support of two of her children, she is not^W physically unable to work and her income has been greatly reduced. It is difficult to see how in view of her testimony which is uncontroverted, she would be able to decently maintain herself and her son according to any standard of living on \$65.00 per month. We do not believe the findings^f of the Chancellor are supported by the evidence, and they are against the manifest weight of the evidence.

We conclude that the petition of the defendant for a decrease in alimony should have been denied, and the petition of the plaintiff for an increase should have also been denied, leaving the payments of alimony the same as provided for in the original decree--\$100.00 per month.

Decree reversed and remanded with directions,

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Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

351 I.A. 135

May Term, A. D. 1953.

General No. 9904

Agenda No. 8.

PATRICIA R. CANNON,
Plaintiff-Appellee,

vs.

RICHARD S. CANNON,
Defendant-Appellant.

Appeal from the Circuit

Court of Greene County.

REYNOLDS, P. J.

This is an appeal from the Circuit Court of Greene County and involves the custody of a minor child and the amount of alimony and support payments to be made by the father to the mother. There was a decree of divorce entered on February 16, 1952, by which the plaintiff was awarded a divorce on the grounds of desertion. In the original decree, the custody of the minor child, Terrence Cannon, was awarded to the plaintiff, the mother, and provided that the child should be kept in boarding school and a summer camp; that the defendant should have the right of custody for two weeks during the summer period, during Thanksgiving and right of reasonable visitation. The decree also provided that the defendant pay the charges of the boarding school, the expenses of summer camp, the clothing expense, dental and medical expenses of the child and the sum of \$50.00 per month for the support and maintenance of the child while not at boarding school or summer camp until March 15, 1952. After March 15, 1952, the defendant should pay to the plaintiff the sum of \$75.00 for her support and maintenance. On June 18, 1952, the defendant filed his

Abstract

351 A. 135

STATE OF ILLINOIS
COURT OF APPEALS
THIRD DISTRICT

May Term, A. D. 1953.

Agenda No. 8.

General No. 2904

Appeal from the Circuit
Court of Greene County.

PATRICIA M. CANNON,
Plaintiff-Appellee,
vs.
RICHARD S. CANNON,
Defendant-Appellant.

REYNOLDS, P. 3.

This is an appeal from the Circuit Court of Greene County and involves the custody of a minor child and the amount of alimony and support payments to be made by the father to the mother. There was a decree of divorce entered on February 10, 1952, by which the plaintiff was awarded a divorce on the grounds of desertion. In the original decree, the custody of the minor child, Terrence Cannon, was awarded to the plaintiff, the mother, and provided that the child should be kept in boarding school and a summer camp; that the defendant should have the right of custody for two weeks during the summer period, during which time he had the right of reasonable visitation. The decree also provided that the defendant pay the charges of the boarding school, the expenses of summer camp, the clothing expense, dental and medical expenses of the child and the sum of \$10.00 per month for the support and maintenance of the child while not at boarding school or summer camp until March 15, 1952. After March 15, 1952, the defendant should pay to the plaintiff the sum of \$75.00 for her support and maintenance. On June 15, 1952, the defendant filed his

motion to modify the order of custody and to modify the alimony award. This motion was subsequently amended and on the 3rd day of September, 1952, the plaintiff filed her petition to modify the divorce decree, asking for more support money. On January 30, 1953, the court denied the motion for change of custody and allowed the motion of the plaintiff for an increase in allowance for support money.

The decree as modified left the custody of the child with his mother subject to the right of the father to have the child every third week-end and other stated periods during the year and required the father to pay to the mother for her support and the support of the child, the sum of \$150.00 per month, beginning March 15, 1953. From that decree, the father, Richard S. Cannon, has appealed to this court.

There can be no question of the authority of the court to modify the decree, both as to the custody and the amount of money necessary for his support. Equally unquestioned is the proposition that the welfare and best interests of the child is the all important consideration to be considered by the court. So, the questions before this court are only two in number, namely, did the court err in leaving the custody of the child with the mother, and, did the court err in increasing the amount of support money to be paid to the mother for her support and that of the child. It does not seem to be disputed that in the original divorce proceedings, the decree was at that time, at least, agreed to by both parties. At that time, the custody was awarded to the mother. At that time, the amount of support money was agreed to by both parties. Yet a few months later, the father is back in court claiming that the

action to modify the order of custody and so modify the alimony award. This motion was subsequently amended and on the 1st day of September, 1935, the plaintiff filed her petition to modify the divorce decree, asking for more support money. On January 25, 1937, the court denied the motion for change of custody and allowed the motion of the defendant for an increase in alimony for support money.

The decree as modified left the custody of the child with him rather than with her as it was in the original decree. During the third week-end and other periods, which during the year was required for father to pay to the mother for her support and the support of the child, the sum of \$150.00 per month, beginning March 15, 1937, from that date, the father, Richard E. Canady, has appealed to this court.

There can be no question of the authority of the court to modify the decree, both as to the custody and the amount of money necessary for his support. It is well established in the proposition that the child is and best interests of the child is the all important consideration to be considered by the court. In the questions before this court and any two in conflict, the court has in leaving the custody of the child with the mother, and the fact of its interest in protecting the money of support money to be paid to the mother for her support and that of the child. It does not seem to be directed that in the original decree provided, the decree was at that time, as I said, agreed to by both parties. At that time, the custody was awarded to the mother. At that time, the amount of support money was agreed to by both parties. For a few months later, the father is back in court asking that the

mother is not a proper person to have the custody of the child, and asking that he be given custody, or in the alternative that a relative be given custody, and the mother is here asking for more money per month. It is therefore highly important that this court, just as much as the trial court, keep in mind that the primary consideration is what is best for the minor child. There was a lot of evidence on both sides as to the fitness of the mother to have custody, and the mental and nervous condition of the child. There is evidence that the mother is suffering from dementia praecox. This is contradicted. There is evidence that the child is in a highly emotional and disturbed mental condition. This is contradicted by evidence of his high grades at school and by evidence of neighbors and friends that the child is a normal and happy child. In cases of this kind, the trial court has the very widest discretion. The Court, sitting as a judge and jury sees and hears the witnesses. He has opportunities of weighing the testimony that this court cannot have from the cold facts in the record. It has long been the policy and rule of this court, that on questions of fact, and on questions involving the exercise of discretion by the court, that unless clearly and palpably erroneous, this court will not disturb the findings of the trial court. Kent v. Kent, 315 Ill. App. 284; Vancuren v. Vancuren, 348 Ill. App. 351. The trial court has found that the best interests of the child will be served by giving his custody to the mother, and has also found that the amount of support money should be increased to \$150.00 per month. There is nothing in the record to warrant this court in overruling these findings. The order of the trial court is affirmed.

Affirmed.

mother is not a proper person to have the custody of the child, and
that it is in the interest of the child that a relative
of given custody, and the mother is being asked for more money per
month. It is therefore highly important that this court, just as
such as the child's best, keep in mind that the primary consideration
is what is best for the child. There was a lot of evidence on
both sides as to the fitness of the mother to have custody, and the
mental and nervous condition of the child. There is evidence that
the mother is suffering from homicidal mania. This is contradicted
there is evidence that the child is in a highly emotional and dis-
turbed mental condition. This is contradicted by evidence of his
high grades at school and by evidence of neighbors and friends that
the child is a normal and happy child. In cases of this kind, the
trial court has the very widest discretion. The court, sitting as
a judge and jury, sees and hears the witnesses. He has opportunities
of weighing the testimony that this court cannot have from the cold
facts in the record. It has long been the policy and rule of this
court, that in questions of fact, and on questions involving the ex-
ercise of discretion by the court, that unless clearly and palpably
erroneous, this court will not disturb the findings of the trial court.
King v. King, 113 Ill. App. 355; King v. King, 113 Ill. App. 351.
The trial court has found that the best interests of the child will
be served by giving the custody to the mother, and has also found
that the amount of support money should be increased to \$150.00 per
month. There is nothing in the record so wrong that this court is over-
ruling these findings. The order of the trial court is affirmed.

Affirmed.

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FRANK FASCHING,

Appellee,

v.

MINNEAPOLIS, ST. PAUL AND SAULT
STE. MARIE RAILROAD COMPANY,
a corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY

351 I.A. 191

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of \$50,000.00 in favor of plaintiff on account of personal injuries and property damage sustained by him when his truck was struck by a freight train operated by defendant across Harris Road in Lake County, Illinois.

The accident occurred on September 29, 1948, shortly before noon. Harris road is a dirt road running in a northerly-southerly direction. Defendant maintained a single-track railroad extending in a northwesterly-southeasterly direction, intersecting Harris road at grade. The railroad operated in what is known as a cut, that is to say, the ground between the railroad track and Harris road, north of the intersection, was higher than either the track or the road. There were no automatic signals at the crossing, but there was a standard railroad crossing sign of the cross-arm design, and some distance to the north of the crossing there was a sign on the west side of Harris road warning of a railroad crossing ahead. The road was slightly downgrade as it approached the track from the north.

On the day of the accident plaintiff, then forty-four years old, was driving a loaded dump-truck in a southerly direction on Harris road approaching the railroad crossing. The truck was driven onto the path of a train being run in a southeasterly direction, resulting in injury to plaintiff's person and damage to his truck. Plaintiff testified that he knew the crossing well, that he had been over it several times each week as well as a number of times the day of the accident. He had procured a load of black dirt at Beelow's farm, located about a quarter of a mile north of the crossing. He stated that it was drizzling at the time; that Harris road was a bad dirt road, wet on the day of the accident, and that he approached the crossing at a speed of approximately five miles an hour; that about twenty-five to thirty feet from the track the road dropped down some three feet; that there was a fence along the track, and weeds along the fence about four feet high which obstructed his view; that he stopped his truck with the bumper about six to eight feet from the nearest rail of the track, looked to the left and then to the right; that he could see down the track to the right, from which the train approached, some three hundred fifty feet; that the right window of his cab was broken and "way down"; that he did not see the train coming or hear any signals warning of its approach; that the cab in which he sat, when he stopped his truck, was about twelve or twelve and a half feet from the nearest rail; and that he drove onto the crossing at about two miles per hour. His truck was approximately

twenty feet in length, and, as he described the accident, sixteen to eighteen feet of his truck had cleared the track when it was struck in the rear.

Plaintiff proceeded on the theory (1) that defendant negligently operated its train without causing a bell to be rung or a whistle to be sounded, as required by statute, and (2) that defendant negligently permitted the crossing to be in a condition dangerous for traffic on Harris road in that the vision of southbound drivers with respect to southeasterly-run trains was obstructed.

There was no one at or near the crossing at the time of the accident except plaintiff. To corroborate his testimony as to the failure of defendant to sound a warning, he called two witnesses. Mrs. Joseph Titus, who lived in a farmhouse along Harris road, testified that she was washing dishes in her home which, she said, was three hundred fifty to four hundred feet from the crossing, whereas the actual distance, according to the record, was five hundred seventy feet. At the time of examination, Mrs. Titus admitted her signature on the typewritten statement given two days after the accident but denied that she had made the statement "I didn't pay any attention to any signal, so could not say if engine whistle or bell was sounded." Frank Beelow, another of plaintiff's witnesses, who was loading black dirt a quarter of a mile from the crossing, testified that he heard no whistle, and he did not know whether a bell had rung.

Defendant's train consisted of two steam locomotives, sixty-one loaded freight cars, eleven empty freight cars,



and a caboose. As against plaintiff's evidence, the engineer, fireman, and head brakeman riding on the lead locomotive, all testified that proper warning signals were given as the train approached the Harris road intersection, as did the fireman and engineer riding on the second locomotive. The bell on the lead locomotive was operating automatically as it approached the crossing. The train was proceeding at a speed of about forty-five miles per hour; obviously it must have emitted smoke from its two coal-powered engines and have made considerable noise.

The remaining charge of negligence relates to the maintenance of an obstructed crossing. To support this charge, plaintiff offered in evidence as Exhibit 4 a photograph taken about three years after the accident, at the height of the growing season, and forty-seven days earlier in the season than the anniversary date of the accident, purporting to be a correct portrayal of the physical condition of the crossing and as tending to show he did not have a clear view down the track to the northwest, the direction from which the train came. This photograph shows a fence running along the railroad right-of-way, with weeds, which were described as about four feet high, growing on either side of the fence. Hagen, a surveyor, called on behalf of defendant, produced a plat made as a result of a survey done in January 1949. He testified as to his observations on visibility down the track to the northwest from various points on Harris road approaching the crossing from the north; he stated that at a point forty feet north of the crossing on Harris road there was clear

vision up the right-of-way to the northwest so that he would be able to see a man on the track at least one-half mile away; that at a point at least seventy feet north of the crossing on Harris road he would be able to see a man over the top of the cut any place approaching from the northwest; and that at one hundred fifty to two hundred feet from the crossing he saw nothing that would obstruct the vision down the track for a person approaching from the north going south. Hagen further stated that at the points indicated there was unobstructed vision up the right-of-way for more than half a mile; that he measured the site of the ground nearest to the track each one hundred feet north of the crossing for five hundred feet and found the height varied from 3.9 feet to 5.5 feet above the top of the track rail.

Another witness, Tronson, a photographer, testified on behalf of defendant and identified eight photographs taken October 3, 1948, four days after the accident, and three photographs taken October 26, 1951. All these photographs show clearly that while the railroad track lies in a cut, there is no obstruction that would intercept the view of a train approaching from the northwest to the driver of a vehicle proceeding south in Harris road. Tronson was cross-examined by counsel for plaintiff, but there was no intimation that the authenticity of the photographs would be challenged with respect to the respective dates as to when they were taken. Aside from the evidence pro and con with respect to the charge that defendant failed to sound a bell or blow a whistle, it

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was still incumbent on plaintiff to prove that he was in the exercise of care in going onto the railroad track, a place of known danger. Consequently, Tronson's photographs, introduced by defendant, assume considerable importance. After defendant rested, plaintiff, as well as Beelow and Mrs. Titus, all of whom testified for plaintiff in his case in chief, were recalled. Plaintiff stated that Tronson's photographs did not correctly portray the physical conditions the day of the accident--the weeds were higher then. Beelow's rebuttal testimony was to the same effect. When Mrs. Titus took the stand on rebuttal, she was shown the photograph (defendant's Exhibit 3) portraying her land on both sides of Harris road, and she stated that while the photograph shows corn growing in the field east of Harris road, in 1948 they had that field planted with oats; "in '48 we did not have corn in the field east of Harris road." Whether or not there was corn in the field was, of itself, of no importance, but it is obvious that the sole purpose in recalling plaintiff, Beelow and Mrs. Titus was to impeach Tronson, the photographer, by discrediting his testimony that his photographs were taken October 3, 1948, four days after the accident. Plaintiff and Beelow simply gave their opinion that the photographs did not show the weeds as high as they were the day of the accident, but it was sought, by means of Mrs. Titus' testimony, to specifically impeach the authenticity of the photographs by saying that no corn was grown the year of the accident, as shown in defendant's Exhibit 3. Inasmuch as

Mrs. Titus' previous testimony was of doubtful credibility with respect to the sounding of warning signals, defendant had the right to challenge her impeaching evidence, as well as that of plaintiff and Beelow, by introducing surrebuttal evidence. The case had been on trial for about a week. Counsel for defendant then told the court that he had been taken by surprise by the rebuttal testimony of the witnesses, and asked the court to give him "until two o'clock this afternoon to produce evidence, because they have incorrectly introduced this evidence." This prompted counsel for plaintiff to state that "if counsel is permitted to introduce further any additional evidence here, I will ask the court to consider continuing the case until next week, until I can produce further evidence to present witnesses, and any opportunity in order to check." Defendant counsel thereupon joined in the motion that the case be continued to the following week, but after a discussion between the court and counsel, the court finally expressed the opinion that further evidence would be cumulative only, and refused to let the case go over. Thereupon defendant made an offer of proof and tendered a series of photographs, marked Exhibits 14 to 17 inclusive; the offer was denied and the photographs were not allowed in evidence. The tendered proof would have consumed only a few minutes and should have been allowed. Since Mrs. Titus' testimony had already been impeached on an earlier occasion during the trial, there was all the more reason why the offer by defendant to impeach her testimony as to the authenticity of

the photograph in question should have been allowed. See Wigmore on Evidence with respect to the discretion of the court where rebuttal is offered (Vol. 6, 3rd ed., sec. 1873, p. 511, and pp. 516-517; and sec. 1874, pp. 517-518); see also Schoen v. Elsasser, 315 Pa. 65, 172 A. 301; and Throckmorton v. Holt, 180 U.S. 552. We think that the refusal of the court to permit defendant to introduce evidence to impeach impeaching witnesses on the principal charge of negligence constituted reversible error.

Since the case will in all probability be retried, we make no comment on the other grounds urged for reversal, including the contentions that the verdict is against the manifest weight of the evidence and that plaintiff was guilty of contributory negligence. For the reasons indicated, the judgment of the Superior Court is reversed, and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE
REMANDED FOR A NEW TRIAL.

NIEMEYER, J., and BURKE, J., Concur.

A

APPEAL FROM
CIRCUIT COURT
COOK COUNTY

351 I.A. 192

Plaintiff and defendant were married August 31, 1940. Three children were born to them, aged respectively 8, 6 and 2 years at the time the complaint was filed. They were owners as joint tenants of the property occupied by them as a home, subject to an incumbrance of from eight to nine thousand dollars. Complaint was filed June 9, 1951 and charged cruelty. Defendant was arrested on that day and later sent to the Psychopathic hospital where he remained about four weeks, having demanded a jury trial. This demand was withdrawn and at his request he was sent

to the State Hospital at Manteno for treatment. He was discharged about 30 days later with a finding of no psychosis. The decree was entered March 4, 1952.

On the 29th or 30th day thereafter, defendant personally appealed to the judge entering the decree, claiming that he had evidence of the adultery of his wife, that the many attorneys employed by him had been advised of this evidence and had refused to present it. In order to protect defendant's interests a motion to vacate the decree was entered and the matter set for hearing. Notice of this action was later given to the attorneys for plaintiff. At the time set for hearing defendant appeared with a number of witnesses. In answer to a question by the court he stated that it would be best if he had an attorney but that he had been unable to get one. He stated further that on returning home unexpectedly before noon of March 12, 1951 he discovered his wife and a man named Katz in the basement of his home under circumstances detailed by him from which an inference of adultery would necessarily arise; that his wife immediately left home, staying with a relative for a day or two when she returned and they lived together in the home, but not as man and wife, until June 9, 1951 when the divorce suit was started and he was arrested.

The witnesses called by defendant testified to his good reputation in the places where he had worked and among business associates, to his good conduct as a father and to the strong attachment of the children for him. The only

testimony by defendant's witnesses even remotely tending to establish improper conduct of plaintiff was the testimony of a neighbor who claimed that after February 1950 she saw a strange car stop nearly every day; a man with a high forehead and dark hair went into the house and stayed "long enough." The record does not disclose the period over which these visits continued. Defendant stated that the record of the telephone company, which he claims plaintiff attempted to have destroyed, showed calls from his home on March 21 and March 30, 1951 to two places of business with which Katz was said to be connected. The court refused to continue the case for production of this evidence. Defendant also asked that the trial judge talk with the boy aged 8 in chambers. The record does not show the nature of the facts expected to be elicited by this talk. Defendant's request was denied.

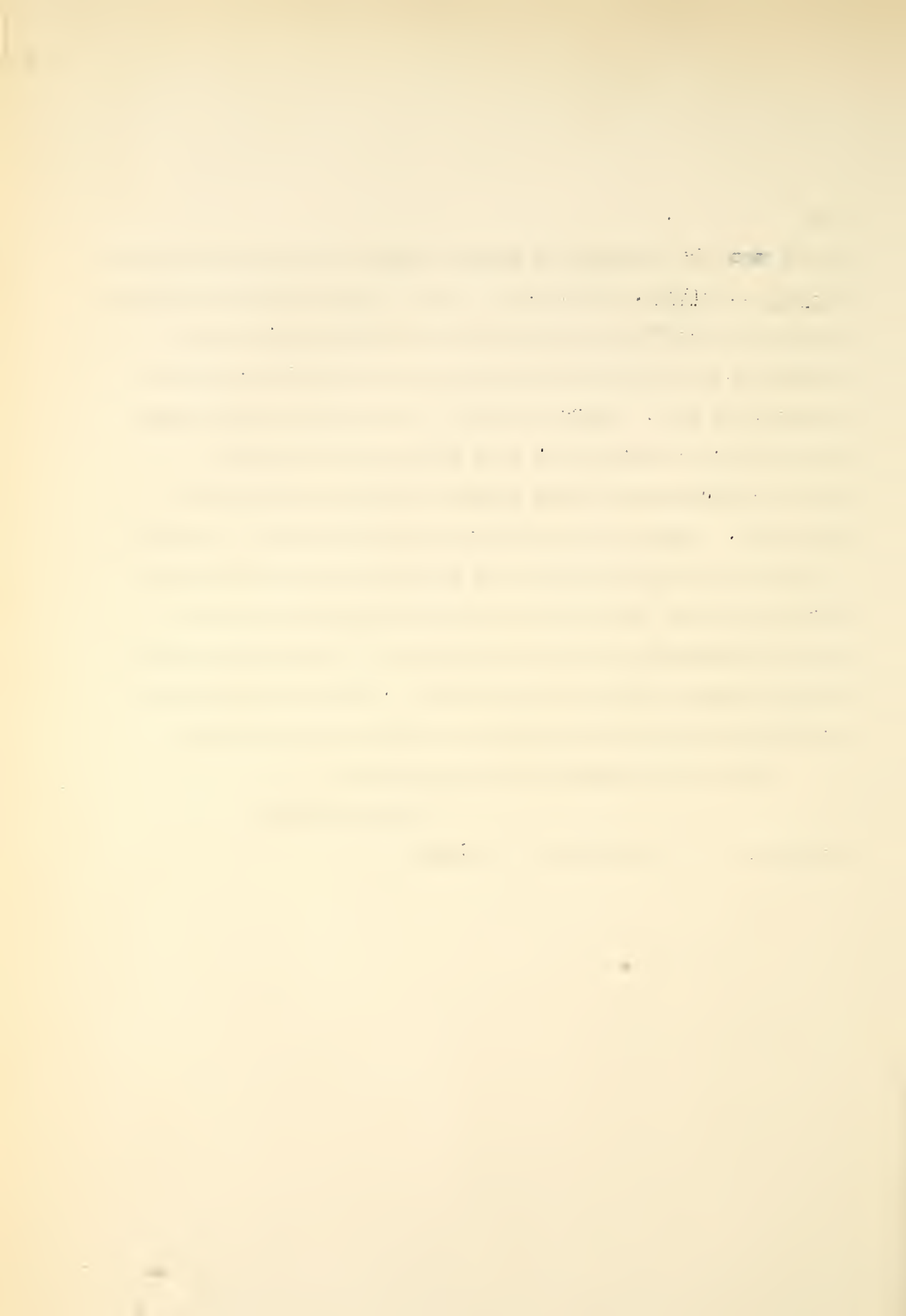
The allowance of a motion to vacate and set aside a decree or orders previously made generally rests in the sound discretion of the court, depending on the facts presented. People ex rel. Elliott v. Benefiel, 405 Ill. 500. The motion to vacate was denied because the court was of the opinion defendant had condoned the alleged offense of March 12, 1951. Condonation is the forgiveness of the antecedent matrimonial offense on condition that it shall not be repeated and that the offender shall thereafter treat the forgiving party with conjugal kindness. It is only when the condition is broken that it will be deemed withdrawn and the injured

party ~~will~~ be permitted to avail himself of the acts condoned. Ollman v. Ollman, 396 Ill. 176, 181. In this case the evidence offered by defendant as to plaintiff's conduct after her return to the home of the parties does not tend to establish adultery by her. There is nothing to show that the strange car stopped at plaintiff's home and the man described but not identified as Katz entered the home after March 12, 1951. There is no evidence of telephone calls to places of business with which Katz was said to be connected after March 30, 1951. The parties lived together more than two months thereafter, and the separation on June 9th was because of defendant's fault, not plaintiff's. What the 8-year-old child would have told is merely a matter of conjecture.

The order appealed from is affirmed.

ORDER AFFIRMED.

FRIEND, P. J., and BURKE, J., Concur.



229 A

45843

351 I.A. 193¹

MATHILDA HEROLD, as administra-
trix of the estate of Carl M.
Herold, Deceased,

Appellant,

v.

HELEN WEITZENFELD,

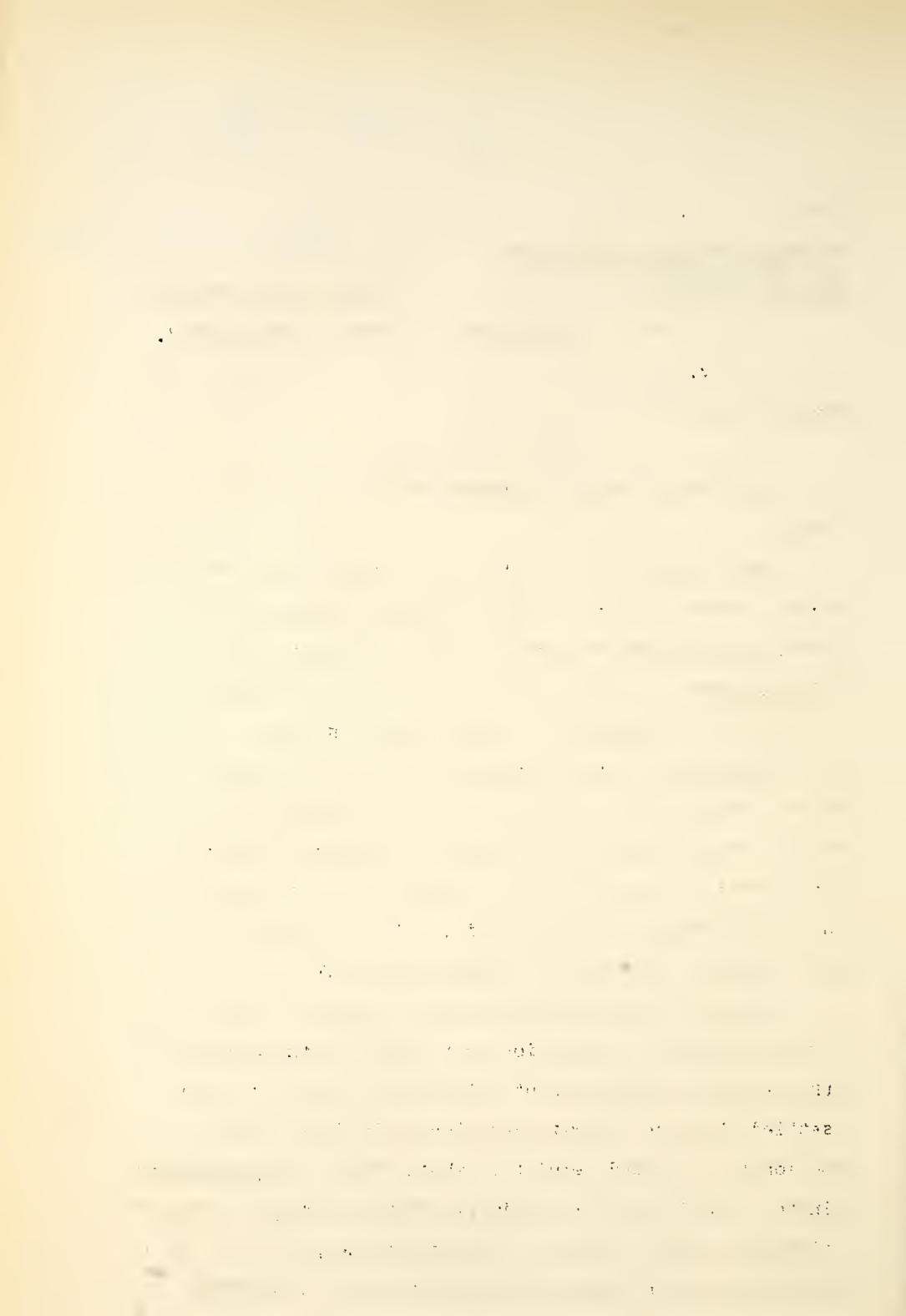
Appellee.

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} APPEAL FROM SUPERIOR
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} COURT, COOK COUNTY.
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MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE
COURT.

This is an action by the plaintiff as administratrix of the estate of Carl M. Herold, deceased, for wrongful death against Helen Weitzenfeld and Jack McCowin. At the conclusion of plaintiff's case, the court directed a verdict of not guilty as to the defendant Helen Weitzenfeld, and entered judgment thereon. As to the other defendant, Jack McCowin, the jury brought in a verdict of not guilty and judgment was entered thereon. Subsequently the court allowed a motion for new trial as to the defendant Jack McCowin. Plaintiff appeals only from the judgment as to Helen Weitzenfeld.

Plaintiff contends that there was ample evidence in the record for submission to the jury of the question of the negligence of defendant Weitzenfeld. The law is well settled that the ultimate question to be decided upon a motion for directed verdict is whether there is any evidence in the record from which a jury, acting reasonably in the eye of the law, could return a verdict for the plaintiff. If there is no such evidence the motion should be allowed.



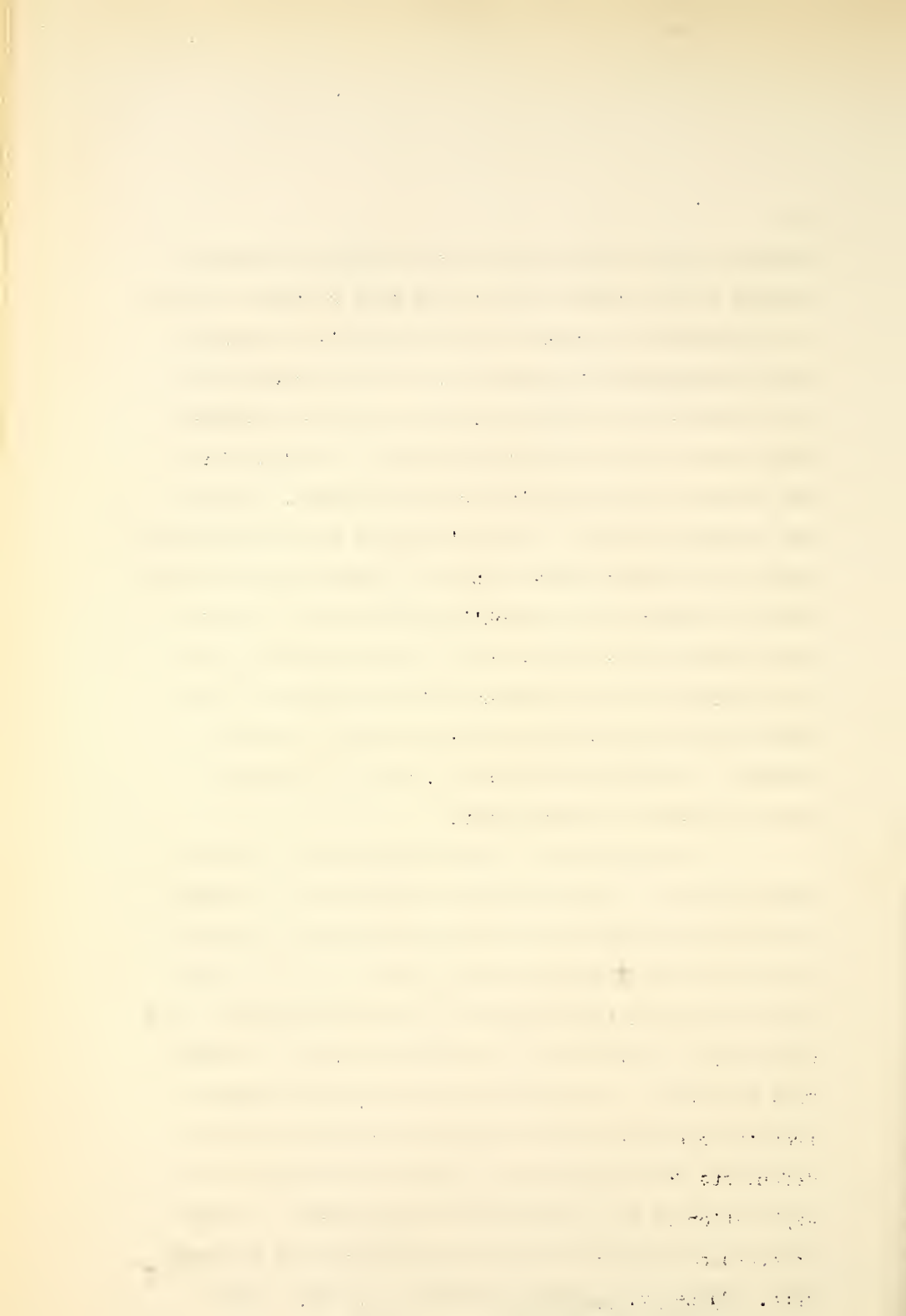
Brandt v. Brandt, 286 Ill. App. 151; Libby, McNeill & Libby v. Cook, 222 Ill. 206; Allen v. U. S. Fidelity Co., 269 Ill. 234; Devine v. Delano, 272 Ill. 166.

The record reveals that the decedent was on the evening of January 30, 1948, seated in the right front seat of a two door passenger car, operated by defendant Jack McCowin. Madelyn McCowin, the wife of Jack McCowin, was seated between the two. McCowin and his wife testified that they were traveling behind other cars east on Marquette road on their way to a dance at the Trianon ballroom. When they reached the intersection of Marquette road and Cottage Grove avenue they made a left hand turn to go north, and while doing so, they were struck by defendant Weitzenfeld's car in the right rear. Mr. McCowin estimated their speed at ten miles an hour and his wife at fifteen miles an hour. The car spun clockwise and traveled about forty feet before it struck a southbound streetcar and came to a stop. In spinning, the right door of the car came open and the decedent was thrown out and crushed to death against the streetcar. Both of the McCowins fell out but were not seriously injured. They did not see what struck them but it is admitted that it was the car of the defendant.

Defendant Weitzenfeld testified that she was driving her car in a westerly direction on Marquette road just prior to the collision at a speed of twenty to twenty-five miles an hour. She was approximately one hundred feet from the intersection of Cottage Grove when the traffic lights

changed to green for east and west traffic. When she reached a point three to five feet east of the curb line of Cottage Grove avenue, she saw McCowin's car coming north approaching Marquette road. It was some fifteen feet south of the south curb. She could not estimate the speed of the car but stated it was traveling fast and did not slow down prior to the collision. It was not stopping for the red traffic signal so she immediately applied her brakes but was unable to avert the collision and the front of her automobile collided with the right rear fender of the McCowin car. Her car came to a stop at the point of the collision. Her testimony was substantiated by one of plaintiff's witnesses, Russell Holzman, a friend of Weitzenfeld, who was following her car prior to the collision.

It is apparent from this summary of the evidence that there is a complete conflict between the testimony of the two defendants and their corroborating witnesses as to how the collision occurred. Can it be said that there was no negligence upon the part of Weitzenfeld that would raise a question of fact for the jury to decide? This is clearly a situation where an accident results from the operation of two vehicles controlled by the defendants for which there is either an absence of an explanation or an unsatisfactory explanation. It must be presumed that the collision arose from want of proper care. Turner v. Cummings, 319 Ill. App. 225. Was



Weitzenfeld or McCowin the guilty party? The sharp conflict in the evidence made this a question for the jury to determine. The law charged Weitzenfeld with the duty of seeing that which is clearly visible and within range of vision. Reed v. Lyford, 311 Ill. App. 486; Greenwald v. Baltimore & Ohio R. R. Co., 332 Ill. 627. Whether she did it or not was a jury question.

We must conclude that the question of negligence on the part of Weitzenfeld should have been submitted to the jury. Judgment reversed and cause remanded with directions to take such further proceedings as are consistent with the views herein expressed.

Judgment reversed and cause
remanded with directions.

Schwartz, P.J., and Tuohy, J., concur.

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A

45852

ROBERT PETRUCELLI, a minor, by
Charles Petrucelli, his father
and next friend, and LORETTA
ANN FALIGO, a minor, by MARY
FALIGO, her mother and next
friend,

Appellants,

v.

ARNOLD SABLE,

Appellee.

351 I.A. 193²

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE
COURT.

This was an action for personal injuries sustained
by plaintiffs against Benjamin Sable and his son, defend-
ant Arnold Sable. On motion of plaintiffs the action
was dismissed as to Benjamin Sable. Trial was had
before a jury, resulting in a verdict of not guilty.
The usual motions were made and plaintiffs appealed.

The record reveals that the accident in question
occurred on March 14, 1948, at about 2:30 P.M. at the
intersection of 79th street and Vernon avenue, Chicago.
It was a dry, clear day. 79th street runs in a general
easterly and westerly direction; carries a double track
streetcar line, and is about forty-five feet wide from
curb to curb. Vernon avenue runs in a northerly and
southerly direction and is about thirty-five feet wide.
There are stop signs requiring Vernon avenue traffic to
stop before crossing 79th street. Defendant, a student
at Purdue University, was 20 years old at that time.

[illegible]

He was driving a Dodge sedan and was traveling northbound on Vernon avenue. Three additional passengers were in his automobile. The only occurrence witnesses are the two plaintiffs and the four occupants in defendant's automobile.

Prior to the accident, plaintiffs attended the Rhodes Theater, which is near 79th street and Vernon avenue. They left the theater to go to plaintiff Loretta Faligo's home. Plaintiff Robert Petrucelli, aged seven, said he knew nothing about the occurrence of the accident. He did not remember how he got hurt. Plaintiff Faligo, aged ten, said that she and the other plaintiff were walking on the north side of 79th street in a westerly direction and when they came up to Vernon avenue they looked both ways. She saw a car which was not far from the stop sign moving toward them. Petrucelli was to the left of her and she was holding his hand. They walked across the street and when they got to the middle the car hit them. She said she got hit so fast in the back that she flew across the street.

Defendant testified that as he drove north on Vernon avenue and came to the intersection of 79th street he brought his automobile to a stop. He did not see anyone on the south crosswalk of the intersection. He did not see any people on the north sidewalk of 79th street, nor did he see anyone west of Vernon avenue nor on the south side of 79th street. When he stopped his car at the intersection,

he did not see any children. After starting to drive across 79th street he did not see any people or children in the area. As he proceeded he pulled over toward the center of Vernon avenue because there was a parked car facing north on the east side of Vernon avenue about thirty feet from the north curb of the street. He was traveling eight or nine miles per hour. When he was about thirty to forty feet past the north curb of 79th street, and traveling about ten miles an hour, suddenly plaintiff Faligo popped into view. He jammed on his brakes. He imagined she came from behind the parked car. She was running west and fast. He didn't see plaintiff Robert Petrucelli. He left skid marks. He got out of his automobile. The girl was standing on the west curb about five or ten feet in front of his car. For the first time he saw the little boy underneath the front of his car. He got back in the automobile and backed it away. A man came up and carried Petrucelli into a gas station at the corner. Defendant gave the police a signed statement which was prepared by the police at the hospital to which the children were taken while defendant was there. The statement indicated that defendant said the accident occurred while plaintiffs were crossing Vernon avenue east to west in the north crosswalk of 79th street. He denied that he made such a statement and said they were not in the north crosswalk. He said that he was nervous at

the time and did not read it closely.

The police officer who took the statement said no one was at the scene of the accident when they arrived; that he did not see any skid marks. This statement of one police officer was substantiated by another. Sidney Bernsen, who was riding in the front seat, testified to substantially the same facts as defendant; said the car did not collide with the girl at any time. This was contrary to a statement that he had given plaintiffs' investigator in which he said the left front bumper must have hit the children. The other two passengers in defendant's car, Golden Jacobson and Donald Jacobson, who occupied the rear seat, did not see the children before the accident. Donald Jacobson testified that when the car came to a stop it was even with the crosswalk. This in substance was the testimony of the witnesses at the trial.

Plaintiffs assign numerous grounds for reversal of the judgment, the first of which is that the verdict of the jury is against the manifest weight of the evidence and that the trial court should have granted plaintiffs a new trial. On this point, an examination of the testimony as heretofore stated, shows that there was a sharp conflict between the respective parties as to how the accident occurred. The jury, who were the judges of the credibility of the witnesses, gave credence to the evidence of defendant rather than that of the plaintiffs. The trial judge, who heard and saw the witnesses, approved the verdict by his

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denial of plaintiffs' motion for a new trial. When the testimony is contradictory, this court will not substitute its judgment for that of the trial court unless the findings are against the manifest weight of the evidence. Kokan v. Costello, 347 Ill. App. 41; Wynekoop v. Wynekoop, 407 Ill. 219. We must conclude that the verdict was not against the manifest weight of the evidence.

Plaintiffs further raise as grounds for reversal that defendant was negligent as a matter of law in failing to see the plaintiffs prior to the accident; that it was defendant's duty at the time and place to watch out for the children. These were questions for the jury to decide. Herndobler v. Goodwin, 310 Ill. App. 267. The jury having decided in favor of the defendant, this court will not disturb its findings.

Plaintiffs also raise several other points for reversal and in each instance they were questions of fact for the jury to decide.

Objections are raised to certain of the instructions given by the trial court. After careful examination, we can see no merit in these objections. The instructions given have had the approval of this court or the Supreme Court. The minor objections to phraseology were not such as would constitute a basis for reversing the judgment. The judgment of the trial court is affirmed.

Judgment affirmed.

Schwartz, P. J., and Tuohy, J., concur.

231 A

45933

FARRELL J. STRODE,)	
)	
Appellant,)	APPEAL FROM MUNICIPAL
)	
v.)	COURT OF CHICAGO.
)	
OLLIE BROWN,)	
)	
Appellee.)	351 I.A. 194 ¹

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE COURT.

Plaintiff, Farrell J. Strode, filed his statement of claim alleging that on November 30, 1949, defendant, Ollie Brown, executed a written lease of certain premises to the plaintiff at a rental of \$300 a month. One of the provisions of the lease provided that defendant would be responsible for all major repairs to the premises so leased. Plaintiff entered into possession and control of the premises and on or about December 1, 1949, the boiler used to heat the building broke down and on inspection plaintiff ascertained that it would have to be replaced. He notified defendant and she refused to do anything about it. Plaintiff expended the sum of \$1,635 to put the boiler in operating condition.

Defendant denied that demand was made upon her to replace said boiler; denied that said expense was included in the major repairs agreed upon by the parties, and stated that it was agreed that only such major repairs would be made by her as was covered by insurance. She further stated that the boiler was in good working order

when turned over to plaintiff and that if said repairs were needed it was through the negligence of plaintiff in the operation of the boiler. She further denied that the sum of \$1,635 was the fair and reasonable expense of placing the boiler in operation.

Plaintiff introduced the lease in evidence; presented proof that he notified the defendant that the boiler had broken down; that he asked her to make the necessary repairs, and that she failed to do so. The boiler man who made the repairs testified that the old boiler could not be repaired; that it was necessary to replace it with one of equal capacity; and that it was properly installed.

The plaintiff offered to testify that he spent \$1,635 in connection with the repair and replacement of the boiler and offered to prove by a qualified witness that the sum was the fair and reasonable cost of replacing it. Upon objection by defendant the court refused to allow this testimony to be introduced.

At the close of plaintiff's case, upon motion of defendant, the court made a finding of not guilty and entered a judgment for the defendant. It has uniformly been held that one of the remedies of the lessee for violation by the lessor of a covenant to repair is to make the repairs himself and recover from the lessor the expense to which he was put in making the repairs. McFarlane v. Pierson, 21 Ill. App. 566; Cromwell v.

Allen, 151 Ill. App. 404; Oppenheimer v. Szulerecki, 297 Ill. 81. In doing this plaintiff must show that the expense incurred is no more than is fair and reasonable. In a transaction such as this the evidence of what was actually paid for necessary repairs is admissible to show the reasonable cost of such repairs. Travis v. Pierson, 43 Ill. App. 579; Cloyes v. Plaatje, 231 Ill. App. 183; Murphy v. Friel, 328 Ill. App. 586.

The testimony of a qualified witness was offered to prove that the charges set forth in the bill for the repairs were fair and reasonable. The court refused to allow him to testify. The qualifications of this witness are amply revealed by the evidence and were sufficient to qualify him to give testimony as to the fairness and reasonableness of the charges made in the bill. Plaintiff should have been allowed to introduce the bill that he paid as proof of his damage. The court erred in excluding this evidence.

The judgment of the trial court is reversed and remanded with directions to grant plaintiff a new trial and for such further proceedings as are consistent with the views herein expressed.

Reversed and remanded with
directions.

Schwartz, P. J., and Tuohy, J., concur.

237 ~~A~~

45976

ANNA M. ALLEN,

Appellee,

v.

CHICAGO TRANSIT AUTHORITY,
a municipal corporation,

Appellant.

)
)
) APPEAL FROM SUPERIOR
) COURT, COOK COUNTY.
)
)
)

351 I.A. 194²

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE
COURT.

This is a suit for personal injuries sustained by Anna M. Allen, the plaintiff, as a result of a fall which she suffered while descending the stairway leading from defendant Chicago Transit Authority's elevated platform to the street at its 43rd street station in Chicago, Illinois. After a trial, the jury found for the plaintiff and assessed her damages at \$2,500, upon which judgment was entered. The usual motions were made and denied by the trial court. Defendant appealed from these findings.

Defendant contends that the verdict was against the manifest weight of the evidence. The case on behalf of the plaintiff, which the jury believed, is that plaintiff, who had done some shopping in the loop after leaving her place of employment at about 2:00 P.M. on December 23, 1948, started home at about 4:00 P.M. with certain parcels. She got off of the elevated train at the 43rd street station at about 5:00 P.M. and walked down the steps with her purse and packages under her left arm. She

noticed that the steps were covered with dirty, slippery snow and ice that was tightly packed. She grasped the banister on the right hand side, negotiated the first flight of stairs and was going down the second flight when her feet slipped out from under her because of the snow and ice. She fell and sustained injuries to her left foot and back. She was taken to the hospital and her leg was placed in a cast. She remained in the hospital about fourteen days. When she left she had to use crutches for about four weeks and did not return to work until about May 11. The night before the accident she had used the elevator to go home. On that night the stairway was in the same condition as it was on the night the accident occurred. Plaintiff and her witnesses when shown photographs of the steps said that they did not look exactly as they remembered the steps on the date of the accident. Two witnesses for the plaintiff substantiated her testimony. One was her sister and the other a friend who formerly worked with her.

Plaintiff introduced as an exhibit a United States Weather Bureau report for the month of December, 1948, which showed that it started snowing on the evening of December 18 and continued with only intermittent interruptions until 1:00 A.M. December 21, 1948. No snow fell from then until after the time of the accident. The report stated: "The packed snow and glaze of the

18th and 19th caused slippery streets and walks for several days."

Five witnesses testified for the defendant that at the time of the accident there was no ice or snow on the stairs. Two of these were disinterested witnesses who came down the stairway at or about the same time as the plaintiff. One of them saw her fall and the other arrived shortly after she fell. Both witnesses identified photographs and stated that they portrayed the area of the steps where plaintiff fell as they were at the time of the accident. On cross-examination, Mrs. Smith testified that on occasions snow blew on the steps where the lady fell but that somebody always got it off. These photographs showed that there was no snow or ice on the steps. A police officer, who was called, said that there was no snow or ice on the stairway although it was wet. On his report of the accident he included no statement as to the condition of the steps. His report did not give the name of any witnesses to the accident. He inquired of the ticket agent if there were any witnesses and she told him she did not have the name of any although Edward Johnson, one of the porters, said he gave his name as a witness to her. Two other witnesses for the defendant were employees--one a porter at the station in question and the other a porter at the 47th street station, who was on his way to work. Both testified that there was

no ice or snow on the steps and that the steps were protected by an enclosure so that snow, ice or rain could not get into that portion of the steps. One of the porters, Clarence Sayles, did not tell the police officer that he was a witness to the accident.

Plaintiff identified her signature on a statement and affidavit attached to it, taken by one of defendant's investigators on March 10, 1949, approximately three months after the accident. In this statement she said she did not know how she fell, or what caused her to fall. She did not notice the condition of the steps. Plaintiff denied making such a statement and said that she did tell the investigator that there was ice and snow on the steps. Defendant did not produce the investigator to deny this statement.

A sharp issue of fact was presented. It is a well established rule of law that the preponderance of the evidence is not to be determined by the number of witnesses who testifies for the respective parties. The position of the witnesses, their opportunities to observe and their interest were important factors. It is the province of the jury to determine which set of witnesses was the more credible and reasonable. Stevens v. Kasten, 342 Ill. App. 421; Cochran v. Koller, 310 Ill. App. 91.

The trial judge, who heard and saw the witnesses, approved the verdict by his denial of defendant's motions.

When the evidence is contradictory, this court will not substitute its judgment for that of the trial court unless the findings are manifestly against the weight of the evidence. Wynekoop v. Wynekoop, 407 Ill. 219.

While the question is close, we are of the opinion that we cannot substitute our judgment for that of the trial court. We, therefore, conclude that the verdict was not against the manifest weight of the evidence. The judgment of the trial court is affirmed.

Judgment affirmed.

Schwartz, P. J., and Tuohy, J., concur.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

May Term, A. D. 1953.

General No. 9898

Agenda No. 5.

In the Matter of the Estate of
Alice M. Glass, deceased,

#

Harvey E. Duncan, Public Administrator
of Ford County, Illinois,
Plaintiff-Appellee,

vs.

Delbert Murray, Creditor Administrator,
Defendant - Appellant.

351 I.A. 242

Appeal from the
Circuit Court of
Ford County.

REYNOLDS, R.J.

Alice M. Glass died intestate on June 26, 1952, leaving no relatives surviving in Illinois. On July 5th, one Delbert Murray, a creditor of the deceased was appointed and qualified as administrator of the decedent's estate. On July 12, 1952, the public administrator of Ford County filed his petition asking for appointment as the public administrator and asking that the letters previously issued to Delbert Murray as a creditor, be revoked. The County Court revoked the letters issued to Delbert Murray as a creditor administrator and appointed the public administrator as administrator de bonis non. From the order of the County Court the creditor administrator, Delbert Murray appealed to the Circuit Court of Ford County; The matter was tried de novo before the Circuit Court without a jury and that court revoked the letters of administration to Delbert Murray and appointed the public administrator, Harvey E. Duncan as administrator de bonis non. From judgment of the Circuit Court the creditor administrator, Delbert

attach

STATE OF ILLINOIS
JUDICIAL DEPARTMENT
CLERK OF THE CIRCUIT COURT

May Term, A. D. 1933.

Case No. 933

Page No. 2

3511A. 342

State of Illinois,
County of Cook,
ss. I, Clerk of the Circuit Court,
do hereby certify that the within
copy is a true and correct copy
of the original on file in my
office.

My E. Deane, Public Administrator,
Cook County, Illinois,
Illinois, deceased.

vs.

Robert Murray, Executor of the Estate of
My E. Deane, Public Administrator,
Cook County, Illinois.

Illinois, Ill.

Allice A. Glasse died intestate on June 20, 1932, leaving no heirs
living surviving in Illinois. On July 22, 1932, one Robert Murray, a creditor
of the deceased, was appointed and qualified as administrator of the de-
ceased's estate. On July 22, 1932, the Public Administrator of Cook County
was notified by the Public Administrator of the Public Administrator and
that the Public Administrator had been appointed as administrator of the de-
ceased's estate. The County Court ordered the Public Administrator to be
a creditor administrator and appointed the Public Administrator as ad-
ministrator of the estate. From the order of the County Court the Public
Administrator, Robert Murray, appealed to the Circuit Court of Cook County;
and after was tried he now before the Circuit Court without a jury and
the court revoked the letters of administration to Robert Murray and ap-
pointed the Public Administrator, Robert A. Murray, as administrator of the
estate. From judgment of the Circuit Court the creditor administrator, Robert

Murray appealed to this court.

There are a number of questions raised by the appeal but actually only one question arises that must be decided by this court. That question is, who was entitled under the probate laws of the State of Illinois to administer this estate? Prior to the Probate Act of 1939, creditors and the public administrator were in the same class, the ninth class, and the courts in passing on the preference between a creditor and the public administrator before the 1939 law, held that the creditor should be preferred. Then the legislature by the Probate Act of 1939, provided as follows: "Chapter 3, Section 248. Persons entitled to preference in obtaining letters. The following persons are entitled to preference in the following order in obtaining the issuance of letters of administration of the various kinds: (1) The surviving spouse or any person nominated by him. (2) The children or any person nominated by them. (3) The father and mother or any person nominated by them. (4) The brothers and sisters or any person nominated by them. (5) The grandchildren or any person nominated by them. (6) The next of kin or any person nominated by them. (7) The Public Administrator. (8) A creditor of the estate." (Italics supplied). The Probate Act of 1939, changed the order of preference from the old law and set the Public Administrator ahead in preference to the creditor. Thus, by the plain language of the statute, the Public Administrator has the right of preference over the creditor. This language is unambiguous and definitely sets the order of precedence. The case of In Re Estate of Richter, 341 Ill. App. 334, is cited by the creditor-administrator in support of his position. However, such case is not relevant as it merely affirms the recognized rule that one of next of kin is preferred as administrator over the public administrator,

THE UNIVERSITY OF CHICAGO

[illegible]

a principle which is not in question here. True, there is dictum referring to the relative preferential rights of creditors and public administrators, but the cases relied on to sustain this dictum are based on the law as it existed prior to the enactment of the Probate Act of 1939. Consequently, this Court is of the opinion that there is no area for the exercise of discretion and the public administrator must be appointed, in view of the expressed and plain intention of the legislature evidenced by the Probate Act of 1939.

The matters urged, that the public administrator had no knowledge of the estate, that he was urged by an outsider to petition and the other matters, are all subordinated to the plain intention of the legislature as to who^m should be entitled to preference in the matter of administration. For the reasons stated, the judgment must be affirmed.

Affirmed.

A statement which is not in American news. From Court to district
relating to the relative commercial position of the two countries and the
administrative, and the same result as in the case of the British
based on the law as it stands prior to the amendment of the British
law of 1873. Consequently, this court is of the opinion that there
is no case for the exercise of discretion in the British administration
which is required, in view of the amendment and the retention of the
legislative provisions of the British law of 1873.

The court says, that the British administration has no power
to alter the law, that it is not to be altered by an act of the British
legislature, but it is to be altered by an act of the British
legislature, and it is to be altered by an act of the British
legislature. For the reasons stated, the judgment must be
affirmed.

affirmed.

3643A

Abstract

Gen. No. 10685

Agenda No. 16.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT.
OCTOBER TERM, A. D. 1953.

351 I.A. 271

IRVILJO BUTTERWORTH ENDERLE,)	
VICTORIA HALL, and JOYCE BUT-)	
TERWORTH, a minor, by Irviljo)	
Butterworth Enderle, her mother)	
and next friend,)	
Plaintiffs-Appellants,)	Appeal from the
)	Circuit Court,
)	Winnebago County.
vs.)	
)	
RONALD LINDSAY,)	
Defendant-Appellee.)	

PER CURIAM.

Irviljo Butterworth Enderle and others, filed a complaint in the Circuit Court of Winnebago County, against Ronald Lindsay in which they alleged in substance, that on the 22nd day of November 1951, at approximately ten o'clock P.M. the plaintiffs were riding in a Chevrolet car which was owned and driven by Irviljo Enderle; that they were going in a southerly direction on Illinois State Highway No. 2 at a point approximately four miles north of the City of Rockford, Illinois; that at said time and place the plaintiffs were in the exercise of due care and caution for their own safety;

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2.

that the defendant, Ronald Lindsay, at said time and place was driving and operating his 1951 Buick automobile in a northerly direction on said highway approaching the automobile in which the plaintiffs were then and there riding; that at said time and place the defendant negligently and carelessly drove his automobile directly into the path of the plaintiffs' automobile while the plaintiffs were on their lawful and proper side of the road, causing plaintiffs' vehicle to strike the automobile of the defendant with great force and violence, causing injuries to the plaintiffs and damage to the plaintiffs' automobile; that at and just prior to the time of the occurrence in question the defendant negligently and carelessly drove his automobile at a speed greater than was reasonable and proper and failed to keep said automobile under control; that as a direct and proximate result thereof, the defendant's automobile skidded on the highway into the path of the plaintiffs' automobile, causing plaintiffs' vehicle to collide therewith from which collision plaintiffs each sustained injuries.

To this complaint the defendant filed his answer in which he denied that the plaintiffs were in the exercise of due care and caution for their own safety, and denied that he was guilty of any negligence in the operation and driving of his automobile at and just prior to the time and place of the occurrence in question, and denied that the plaintiffs were injured, as a proximate result of any negligence on the part of said defendant.

The case was submitted to a jury that found the issues in favor of the defendant. The plaintiffs entered a motion for a new trial and judgment notwithstanding the verdict. These motions were each overruled and judgment entered on the verdict. The plaintiffs have perfected an appeal to this Court.

November 22, 1951, was Thanksgiving Day and about ten o'clock P.M. Irviljo Enderle, one of the plaintiffs, was driving her car south on the North Main road about four miles North of Rockford, Illinois. Her daughter, Joyce Butterworth, was in the back seat and a friend, Victoria Hall, was in the front seat. The weather had been damp earlier in the day, but had turned cool and clear during the evening. The north Main Road is a two-lane concrete pavement, and is level and straight where the accident occurred. Ronald Lindsay, the defendant, accompanied by his girl friend, was driving his car north on the North Main road. As Mrs. Enderle approached the point of the accident, she claims she was driving about thirty-five miles per hour. She observed the Lindsay car approaching her. When the cars were about fifteen feet apart, the Lindsay car suddenly swerved into the south bound lane of traffic and the Enderle car struck the Lindsay car, and the plaintiffs were all injured.

The defendant claimed that he was driving about thirty-five miles per hour when his automobile skidded on a patch of ice on the highway and it was through no negligence on his part, that his rear wheel went off of the pavement throwing his car over into the south bound lane of traffic in front of the plaintiffs' car.

About the only question of fact that is in dispute is whether there was any ice on the pavement which caused the defendant to lose control of his automobile and skid across the pavement in front of the plaintiffs' car.

The plaintiff called six witnesses who testified that there was no ice on the pavement; that the pavement all the way was clear of ice and dry. The defendant himself and his lady friend testified that there were patches of ice on the pavement and that the defendant's car did skid on a patch of ice just immediately before the accident occurred. The evidence being in direct conflict in regard to whether there was any ice on the pavement, the instruction of the Court should be accurate and such that the jury could not be mislead in any way by the given instructions. ✓

The appellants have criticized Instructions No. 17 and 18 as being improper and prejudicial to the plaintiffs' case. Instruction No. 17 is as follows: "The Court instructs the jury that, if you find from the evidence in this case, that on the night of November 22nd, 1951, at or about the hour of 10:00 o'clock P.M. Illinois State Highway No. 2 between the City of Rockford, Illinois, and the City of Beloit, Wisconsin, had frequent and intermittent patches of ice thereon, and that such patches of ice were extremely slippery; and if you further find from the evidence that the defendant, Ronald Lindsay, at and just prior to the time and place of the occurrence in question was driving his automobile in a northerly direction along

and upon said highway at or near a point approximately four miles north of the City of Rockford, Illinois, and that at or near said point said highway was straight and level; and if you further find from the evidence that the defendant, Ronald Lindsay, while so driving his automobile was in the exercise of ordinary care and caution for the safety of other persons and vehicles using the said highway, under the circumstances and conditions existing at said time and place; and if you further find that, without fault or negligence, as defined in these instructions, on the part of the defendant, Ronald Lindsay, his said automobile skidded out of control on any icy patch existing on said highway at said place, causing the automobile of the defendant to skid from the easterly or north bound half of said highway to the westerly or south bound half of said highway into the path of the plaintiffs' south bound automobile; and if you further find that plaintiffs' south bound automobile collided with defendant's automobile and that the plaintiffs were injured as a proximate result thereof, then you are instructed that, under such circumstances, if you so find, the plaintiffs cannot recover from the defendant and you should find the defendant, Ronald Lindsay, not guilty." This Court in the case of Dahlgren vs. Holtzheimer, 348 Illinois Appellate, 56 in discussing similar instructions held that it was reversible error to give them, and we there stated that the vice in one of the instructions was the signalling out of the skidding and giving that undue precedence. The instruction should have been refused.

Instruction No. 18 is as follows: "The Court instructs the jury that the burden of proof is upon the plaintiffs to prove by the greater weight or preponderance of the evidence that the defendant, Ronald Lindsay, was guilty of negligence in the driving and operating of his automobile at and just prior to the occurrence in question and, in this regard, it is not sufficient to show only that the automobile of the defendant skidded on the ice, if any, but the plaintiff must further prove by the greater weight and preponderance of the evidence that the defendant was guilty of some negligent act or omission in the driving of said automobile, by which said defendant negligently caused said automobile to skid on the ice, if such was the fact."

The above instruction is erroneous and very misleading. It tells the jury that the plaintiffs must prove that the defendant's car skidded on the ice. This was a controverted question of fact, and the plaintiffs and all their witnesses testified positively that there was no ice on the pavement at the place where the collision occurred. It was only the defendant's witnesses that testified that there was any ice on the pavement. The burden of proof was not upon the plaintiffs to prove that the defendant's car skidded on the ice, which was the cause of the accident, but this was a matter raised by the defendant as a defense to the plaintiffs' suit. The instruction should not have been given.

The defendant called Joseph Ferona, a Deputy Sheriff of Winnebago County a witness who had investigated the accident shortly after it occurred. He claims that he had made notes of what he observed, then reduced the same to typewritten form,

but he had no independent recollection whatsoever, in regard to the accident. The attorney for the defendant questioned him in regard to what happened, and the witness volunteered a statement that the "road was icy." This was objected to by the attorney for the plaintiff, and the Court promptly sustained the objection and instructed the jury to disregard the answer. Later, after the plaintiffs had called some rebuttal witnesses the defendant's attorney stated in the presence of the jury, "In view of the deputy's inability to recollect this particular accident, I want to ask the plaintiffs' attorneys if they will stipulate that the sheriff's report can go in evidence." The attorney for the plaintiff stated: "It wouldn't be proper to so stipulate." The Court then stated: "You will either stipulate or you won't." The attorney for the plaintiff then stated: "We will not stipulate, your honor." Then the attorney for the defense started to ask a question and the attorney for the plaintiffs objected to any further questions about this matter in the presence of the jury. The Court indicated that any further statements should be made outside of the presence of the jury. To which the attorney for the defendant replied: "I know what the answer is. The defendant has nothing further." Jurors as intelligent men and women know that the attorneys for the plaintiffs are presenting their case in the most favorable light to their side of the litigation, and the defendant also is presenting his case in a most favorable light to the defendant. When Mr. Ferona was being interrogated, the Court stated: "The report itself is not competent evidence." In

the arguments to the jury the attorney for the defendant criticized the attorneys for the plaintiffs for not stipulating that the report of the officer be admitted in evidence. These arguments and questions regarding the officer's report were certainly prejudicial to the plaintiffs' case.

The appellee in his brief has made a motion to dismiss this appeal, because of the insufficiency of the abstract filed by the appellants. The points that he has raised are well taken, but the appellants were granted leave to file, and did file an amended abstract, which was after the appellee had filed his brief, and the points raised and the original abstract wherein it was deficient have been corrected, so the motion to dismiss will necessarily have to be overruled.

It is our conclusion that the plaintiffs did not have a fair and impartial trial, and the judgment of the Circuit Court of Winnebago County is hereby reversed and the cause remanded.

Reversed and remanded.

The agreement by the two parties for the delivery
of the goods was made on the 1st of January 1900.
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Abstract

General No. 10702

Agenda No. 20

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

351 I.A. 304

May Term, A.D. 1953

BONNIE BETH NEUCHILLER, a minor,
by Emma M. Dana, her mother
and next friend,

Plaintiff-Appellant,

vs.

BERNARD B. NEUCHILLER,

Defendant-Appellee.

Appeal from the
Circuit Court of
McHenry County,
Illinois.

Dove, P.J.

The complaint in this case was filed on October 17, 1952, by Emma M. Dana on behalf of her daughter, Bonnie Beth, against the defendant, Bernard B. Neuchiller, and prayed for an injunction directing the defendant to reinstate a \$5,000.00 life insurance policy upon the life of the defendant which named the plaintiff as beneficiary, for an order directing the defendant ^{to pay} a stated sum of money for plaintiff's support, and for a declaratory judgment finding that the defendant is the father of the plaintiff.

In her complaint the plaintiff alleged that her mother, Emma M. Dana, ~~was~~ for several years prior to plaintiff's birth (which occurred on April 26, 1950) ~~was~~ was, and still is, the wife of Arthur J. Dana; that the defendant is, and for more than

Appeal

General No. 10702

General No. 10702

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

May Term, A.D. 1933

Appeal from the
Circuit Court of
McHenry County,
Illinois.

BONNIE BETH NEUCHILLER, a minor,
by Emma L. Dana, her mother,
and next friend,
Plaintiff-Appellant,
vs.
BERNARD F. NEUCHILLER,
Defendant-Appellee.

Dove, P.J.

The complaint in this case was filed on October 17, 1932, by Emma L. Dana on behalf of her daughter, Bonnie Beth, against the defendant, Bernard F. Neuchiller, and prayed for an injunction directing the defendant to reinstate a \$5,000.00 life insurance policy upon the life of the defendant which named the plaintiff as beneficiary, for an order directing the defendant to pay to the plaintiff a sum of money for plaintiff's support, and for a declaratory judgment finding that the defendant is the father of the plaintiff.

In her complaint the plaintiff alleged that her mother, Emma L. Dana, was for several years prior to plaintiff's birth (which occurred on April 26, 1930) was and still is, the wife of Arthur J. Dana; that the defendant is, and for more than

ten years last past has been, a physician and surgeon licensed to practice his profession in the State of Illinois with offices in the City of Woodstock; that defendant became the father of plaintiff under the following circumstances; viz.: that plaintiff's mother consulted defendant on December 13, 1946, about some coughing by which she was bothered; that defendant, either through gross ignorance or incompetence in his profession, or wilfully, unethically and illegally, claimed to have diagnosed various serious illnesses in plaintiff's mother, such as cancer, circulatory disease, tuberculosis, ruptured appendix, absessed bowels, heart trouble, nephritis, and mental condition; that sometime after making said purported diagnosis, defendant instructed Arthur J. Dana, the husband of the plaintiff,^a to abstain from having marital relations with plaintiff's mother because such relations might endanger the life of plaintiff's mother, and that said Arthur J. Dana followed said instructions.

The complaint further alleged that the defendant prescribed opiates and other strong and powerful medicines for analgesic purposes; that thereafter, at numerous times, while plaintiff's mother was helpless under the influence of said drugs so prescribed by defendant, he, the said defendant, had sexual intercourse with the plaintiff's mother, causing her to become pregnant and to give birth to plaintiff; that thereafter the defendant informed his own father, mother, and brother that he, the defendant, was the plaintiff's father; that he purchased a \$5,000.00 life insurance policy on his life and made plaintiff the beneficiary thereof; that he paid the first annual premium on the policy; that he promised to pay \$20.00 a week

ten years last past has been a physician and surgeon licensed to practice his profession in the State of Illinois with offices in the City of Woodstock; that defendant became the father of plaintiff under the following circumstances; viz.: that plaintiff's mother consulted defendant on December 15, 1917, about some coughing by which she was bothered; that defendant, either through gross ignorance or incompetence in his profession, or willfully, unethically and illegally, claimed to have diagnosed various serious illnesses in plaintiff's mother, such as cancer, circulatory disease, tuberculosis, ruptured appendix, elevated bowels, heart trouble, hepatitis, and mental condition; that a letter after making said purported diagnosis, defendant instructed Arthur J. Davis, the husband of the plaintiff, to abstain from having marital relations with plaintiff's mother because such relations might endanger the life of plaintiff's mother, and that said Arthur J. Davis followed said instructions. The complaint further alleged that the defendant prescribed opiates and other strong and powerful medicines for analgesic purposes; that thereafter, at her own risk, while plaintiff's mother was helpless under the influence of said drugs so prescribed by defendant, he, the said defendant, had sexual intercourse with the plaintiff's mother, causing her to become pregnant and to give birth to plaintiff; that thereafter the defendant informed his own father, mother, and brother that he, the defendant, was the plaintiff's father; that he purchased a \$5,000.00 life insurance policy on his life and made plaintiff the beneficiary thereof; that he paid the first annual premium on the policy; that he promised to pay \$20.00 a week

to plaintiff's mother for plaintiff's support; that he told the said Arthur J. Dana that he, the defendant, was the father of the plaintiff; that the mother of plaintiff was thereby caused to lose her gainful employment, and she became incompetent physically, emotionally, and mentally to secure and hold any gainful employment; that defendant thereafter cancelled the said \$5,000.00 insurance policy, and he has refused and still refuses to pay \$20.00 a week, or any other sum, for plaintiff's support; and concluded that defendant's confession to Arthur J. Dana that he, the defendant, is the plaintiff's father morally and legally relieved Arthur J. Dana from supporting the plaintiff.

The sufficiency of this complaint to state a cause of action was challenged by defendant's motion to dismiss to which was attached a certified copy of plaintiff's birth certificate showing the name of the plaintiff to be Bonnie Beth Dana and the name of her father as Arthur Joseph Dana. Upon a hearing the circuit court of McHenry County sustained this motion, dismissed the complaint with prejudice and the plaintiff appealed to the supreme court, which court transferred the cause, without opinion, to this court.

The parties agree that the only issue presented by the pleadings is whether the plaintiff, an illegitimate child, can sue her putative father for support and the other relief prayed for in this complaint. A bastard or illegitimate child may be a child born during wedlock but not the child of the mother's husband, as well as a child begotten and born out of wedlock (Bouvier's Law Dict.). Under the common law, which has been adopted as the law of this state, a putative father was under no legal liability to support his illegitimate child. In

to plaintiff's mother for plaintiff's support; that he told
the said Arthur J. Dana that he, the defendant, was the father
of the plaintiff; that the mother of plaintiff was thereby
compelled to lose her regular employment, and she became incompetent
physically, emotionally, and mentally to support and hold any
plaintiff's employment; that defendant thereafter concealed the
said \$3,000.00 insurance policy, and he refused and still
refuses to pay \$70.00 a week, or any other sum, for plaintiff's
support; and concluded that defendant's conduct toward Arthur J.
Dana that he, the defendant, is the plaintiff's father morally
and legally relieved Arthur J. Dana from supporting the plaintiff.
The sufficiency of this complaint to state a cause of
action was challenged by defendant's motion to dismiss to which
was attached a certified copy of plaintiff's birth certificate
showing the name of the plaintiff to be John A. Dana and the
date of her father as Arthur Joseph Dana. Upon a hearing the
court found that defendant's motion was proper, and that the
complaint was proper and the plaintiff's motion was proper to the
supreme court, which court transferred the cause, without opinion,
to this court.

The parties agree that the only issue presented by the
plaintiff is whether the plaintiff, an illegitimate child, can
sue her putative father for support and the other relief prayed
for in this complaint. A defense of illegitimate child may be
a child born during wedlock but not the child of the mother's
husband, as well as a child born out of wedlock
(Foster's Law Book). Under the common law, which has been
adopted as the law of this state, a putative father was under
no legal liability to support his illegitimate child. In

Murrell v. Industrial Commission, 291 Ill. 334, the court said (p. 336): "At common law a child born out of wedlock was nobody's child. He was without parents or kindred, without name, without heritable blood and without many rights. He could have no heirs except his own lineal descendants. He could not inherit even from his mother or she from him. His settlement did not follow his mother but was wherever he was ~~wherever he was~~ born. His parents were under no legal obligation for his support. This is his condition in Illinois today except as it has been changed by statute. He may now inherit from his mother or any maternal ancestor, and his lawful children may represent him and take by descent any estate which he could have taken if living. His father may be compelled to assist his mother to a very limited extent in his support."

The Bastardy Act (Chap. 17, Ill. Rev. Stat., Section 1-18) provides some liability for support of an illegitimate child by its putative father and outlines the procedure to be followed. This statutory duty was unknown to the common law, and the law is well settled that where a duty or liability unknown to the common law is imposed by statute, such liability can be enforced only in the manner which the statute provides. (Cedar Park Cemetery Assn. v. Cooper, 408 Ill. 79,82; Walter v. Northern Ins. Co. ^{of New York}, 370 Ill. 283.) In our opinion the law imposes no duty upon the defendant to support plaintiff except as provided by statute.

The allegations of the complaint concerning the life insurance policy are that the defendant purchased this life insurance policy on his life and made the plaintiff the beneficiary thereof. It nowhere appears that this insurance policy

Marrell v. Industrial Commission, 207 Ill. 324, the court said (p. 325): "As common law a child born out of wedlock was nobody's child. He was without parents or kindred, without name, without heritable blood and without any rights. He could have no heirs except his own lineal descendants. He could not inherit even from his mother or the father. His estate did not follow his mother but was wherever he was ~~born~~. His parents were under no legal obligation for his support. His estate was not in the father's hands except as it has been changed by statute. His very name followed from his mother or any natural ancestor, and his legal children may represent him and take by descent any estate which he could have taken if living. The father may be compelled to support his children to a very limited extent in his support."

The Statute for (Chap. IV, Ill. Rev. Stat., Section 1-12) provides some liability for support of an illegitimate child by the putative father and outlines the procedure to be followed. This statutory duty was unknown to the common law, and the law is well settled that where a duty or liability unknown to the common law is imposed by statute, such liability can be enforced only in the manner which the statute provides. (Coker v. Secretary of State, 208 Ill. 75, 82; Matter v. Northern Ins. Co., 200 Ill. 235.) In our opinion the law imposed no duty upon the defendant to support Marrell except as provided by statute.

The allegations of the complaint concerning the life insurance policy are that the defendant purchased this life insurance policy on his life and made the plaintiff the beneficiary thereof. It now appears that this insurance policy was purchased by the defendant on his life and made the plaintiff the beneficiary thereof.

was purchased as a result of any agreement between the plaintiff and the defendant or between the defendant and a third person for the benefit of the plaintiff. There is nothing alleged that shows any right in the plaintiff to require the defendant to keep the insurance policy in force. The purchase by the defendant of the insurance policy appears to have been entirely voluntary on the part of the defendant and did not arise out of any right of the plaintiff or duty on behalf of the defendant.

To sustain her contention that the complaint states a good cause of action against the defendant for support and other relief, plaintiff cites and relies on *Daily v. Parker*, 152 F 2d 174, and *Johnson v. Luhman*, 330 Ill. App. 598. In *Daily v. Parker*, supra, the court held a child has a cause of action for damages against a third person who has caused the child by his misconduct to lose the support and maintenance of his father as well as a cause of action for the destruction of other rights belonging to the child arising out of and resulting from the family status. In *Johnson v. Luhman*, supra, several children in the same family brought a suit for damages against the defendant on account of her alienating the affections of their father and depriving them of his support, maintenance, and society. The court held that the relationship between a father and his children is one which the law recognizes and which it will protect, and, that the defendant, having invaded and damaged this relationship, must respond in damages. The legal position of children at common law was not such as would bar their right to bring an action against one who had alienated their father's affection and deprived them of his support and

society. (Johnson v. Luman, 330 Ill. App. 598,607.) Both of these cases involved legitimate children, and the facts are clearly distinguishable from the facts in the instant case. The question of support for an illegitimate child from its putative father was in nowise involved in either of the cases relied upon by appellant.

Nor does the declaratory judgment statute aid plaintiff. The declaratory judgment statute does not create substantive rights or impose duties that did not exist before its adoption. (Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 57 Sup. Ct. 461.) As said in Coven Distributing Co. v. Chicago, 346 Ill. App. 448, at p.453: "As we understand it the Declaratory Judgment Act was not designated to supplant existing remedies but is an alternative or additional remedy to facilitate the administration of justice."

The judgment order of the circuit court dismissing plaintiff's complaint is affirmed.

Judgment affirmed.

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CHICAGO BAR ASSOCIATION

45984

ETHEL VAN LAATEN and CARL
VAN LAATEN, Jr., a minor,
by ETHEL VAN LAATEN, his
mother and next friend,
Appellants,

v.

CHICAGO ATHLETIC ASSOCIATION,
a corporation,
Appellee.

)
)
) APPEAL FROM
)
) SUPERIOR COURT,
)
) COOK COUNTY.

351 I.A. 373

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE
COURT.

This is a suit under the Dram Shop Act, filed by
plaintiffs, a mother and son, for loss of means of support
as a result of the death of Carl Van Laaten, the husband
and father of the plaintiffs, against the defendant,
Chicago Athletic Association, for loss of their means of
support. Plaintiffs claim that while intoxicated from
liquor sold to decedent by the defendant, he fell down
the stairway of the defendant club and injured himself,
by fracturing a femur. He later died. The jury returned
a verdict of not guilty. Judgment was entered on the
verdict and the plaintiffs made the usual motions which
were denied by the trial court.

Plaintiffs contend that the trial court erred in
(1) permitting a series of questions by defendant's
counsel over objection by plaintiffs designated to show
subsequent advantageous change in the plaintiffs' circum-
stances as a result of the death of decedent, which was
prejudicial to plaintiffs; (2) permitting defendant's
counsel to indulge in unfair and improper closing argument

to the jury, and (3) giving certain instructions submitted by the defendant.

The essential facts are that the decedent maintained his Chicago residence at the Illinois Athletic Club. Plaintiffs, who are his widow and son, resided in Kalamazoo, Michigan. His usual custom was to go there over the week-end. He was a member of the defendant, Chicago Athletic Association, but never resided there. He had been a salesman for the Wyandotte Chemical Company for over forty years and as such did considerable entertaining at the defendant club. On April 9, 1948, at about the hour of 9:00 P.M. he had a fall on the stairs of the defendant club. He died about twenty-nine days later. The coroner's report found that his death was due to arteriosclerotic heart disease and coronary occlusion. The deputy coroner, a heart specialist, testified to this effect and stated that the constant use of alcohol by the decedent did not contribute to his death. He further stated that the fractured femur did not contribute to his death. Two other doctors, plaintiffs' witnesses, testified that he had a heart condition and had been given treatment for it over a period of years. He carried a heart tablet or nitroglycerin tablet with him at all times. Neither of these doctors denied the conclusion of the deputy coroner, nor was any other testimony offered by plaintiffs to rebut it.

As to intoxication, three witnesses for

defendant testified that he was sober immediately prior to and after the accident. One witness for plaintiffs, a doctor, testified that he was intoxicated at about three o'clock in the afternoon. Another witness, a doctor, testified that he had been drinking and showed indications of it at about six o'clock in the evening. No witness testified he was intoxicated when he fell about 9:00 P.M.

It is significant that no witness testified that the decedent was seen drinking on defendant's premises, which is a large social club with many members and has 14 bartenders on duty at one time. The records of defendant showed that \$7.65 was charged to the decedent for beverages on the day in question. A lady friend of decedent's had been authorized for a number of years to sign his name to checks at the Club, as had various customers of his. On the day in question he had lunch with her at the Club but drank no liquor, although she had one drink. Subsequently, he went to the Biltmore Tap, which he often frequented, and later the lady friend found him there drinking. This tavern was not connected with the Club and it was not joined as a party defendant.

In the course of the cross-examination of plaintiff Carl Van Laaten, Jr., subject to objection, it was revealed that prior to decedent's death he had attended a public high school; after decedent's death he attended a military academy, which required the payment of tuition;

that he had funds in his own name; that he did not borrow money to pay his tuition and had money in the bank after he graduated from the academy. Upon plaintiffs' counsel's insistence, further similar questioning was held inadmissible and defendant made an offer of proof. Assuming that this type of cross-examination by defendant's counsel was improper (Deel v. Heiligenstein, 244 Ill. 239; Gilmore v. Killion, 281 Ill. 154; McConnell v. Bogaert, 208 Ill. App. 582; Whiteside v. O'Connors, 162 Ill. App. 108), did this, under all the facts and circumstances in this case, constitute reversible error?

Viewed from the point most highly favorable to the plaintiffs, their case against the defendant was nebulous. The proof, if any, as to decedent's intoxication when he fell down the steps of the defendant club is highly speculative. The proof of drinking intoxicating liquor at the defendant club on the day of the decedent's injuries is slight. If the court had directed a verdict for defendant at the close of the case, it is very doubtful if we would be in a position to set it aside because of plaintiffs' failure to prove that intoxication contributed to or was the cause of the decedent's death. Considering all of these factors, we are of the opinion that it was the failure of plaintiffs' proof that affected the ultimate decision of the jury rather than any prejudicial cross-examination of plaintiff Carl Van Laaten, Jr.

An examination of defendant counsel's closing argument reveals it is subject to criticism but it is not such as would justify the granting of a new trial.

Chapin v. Foege, 296 Ill. App. 96; Field v. Ingersoll,
228 Ill. App. 457.

The instructions, to which counsel for the plaintiffs object, were not included in the report of proceedings and were not certified to by the trial judge. Under these circumstances we would not be bound to consider them. City of Chicago v. Callender, 396 Ill. 371; Dorgan v. Graeber, 335 Ill. App. 503. We have, however, examined the instructions complained of and do not find any substance to plaintiffs' objections. The decision of the trial court is affirmed.

Decision affirmed.

Schwartz, P. J., and Tuohy, J., concur.

Abstract

3663 A

STATE OF ILLINOIS

APPELLATE COURT

THIRD DISTRICT

OCTOBER TERM, A.D. 1953

351 I.A. 374

General No. 9892

Agenda No. 3

Horace E. Gunn,

Plaintiff-Appellant,

vs.

Montgomery Ward & Co., Inc., a Corporation,

Defendant-Appellee.

)
)
) Appeal from
) the Circuit Court
) of Vermilion County
)

Wheat, J.

Plaintiff-appellant Horace E. Gunn, brought suit in the Circuit Court of Vermilion County to recover possession of improved real estate in the City of Danville occupied by defendant-appellee, Montgomery Ward & Co., as lessee, and to recover double rent for defendant's allegedly wrongful holding over after notice of termination of its lease and demand for possession.

The complaint, as amended, alleges that the real estate in question was leased to defendant by plaintiff's assignor under a written lease and three separate supplements thereto, all of which were prepared by defendant and submitted on its forms to plaintiff's assignor, that the real estate in question was conveyed and the

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CONFIDENTIAL

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There is no other person named 'James' in the list.

to determine if there is any connection between the two.

the committee is unable to determine the exact date of the meeting.

— *Journal of the American Medical Association*, 1967, 201: 1001-1002.

criticism. I have not taken account of it, all of which

was prepared by information and regulations in the form of a chart.

and the Government are anxious to ensure that the best possible results are achieved in the future.

lease as supplemented was assigned to plaintiff, that on September 25, 1951, plaintiff terminated defendant's tenancy as of November 1, 1951, by serving notice of termination, as provided in the lease, and that on November 8, 1951, demand for possession was served on defendant. Defendant's motion to strike the amended complaint was sustained and upon election of plaintiff to stand thereon, judgment was entered for defendant from which judgment plaintiff appeals.

The material provisions of the lease, executed January 24, 1936, are as follows:

(Paragraph 1)

"The undersigned lessor does lease to lessee (certain described real estate) to have and to hold the same for and during the term commencing on the 1st day of February, 1936, and terminating on the 31st day of January, 1939, and thereafter unless and until the tenancy is terminated by either party by thirty (30) or more days' written notice to the other party. . ."

(Paragraph 5)

"It is mutually understood and agreed between the parties hereto that the demised premises are to be used by the lessee in connection with its use and occupation of the premises now under lease to the lessee located in the Temple Building, Danville, Illinois, and that the lessee may, if it is deprived of possession, or the right to possession, of said store premises, for any reason whatever, or if the lessee ceases to conduct a retail business on said premises, cancel and terminate this lease by giving the lessor thirty (30) or more days' written notice of its intention so to do. In case of such termination, or cancellation, all obligations of the lessee under this lease shall cease."

The lease was amended by three supplemental agreements, the first of which, dated September 30, 1936, granted the tenant an option to extend the fixed term of the lease at an increased rent. The second amendment was dated December 28, 1938, cancelled the first amendment and extended the fixed term for three years. The third amendment dated July 17, 1941, extended the term to February 29, 1964. Each of these supplements otherwise retained all of the provisions in the original lease and in particular no modification was made as to Paragraphs 1 and 5 above quoted.

Plaintiff's contention that he could effectively cancel the lease in the manner alleged in the amended complaint is based first upon the proposition that, as defendant, under the above quoted Paragraph 5 of the lease, has the right to terminate the lease upon the occurrence of a contingency within its control, i.e., its cessation of business in the Temple Building, the term demised under the principal lease is expressly a tenancy at the will of the lessee. Accordingly, under a doctrine of mutuality which plaintiff contends is applicable, the tenancy is likewise at the will of the lessor.

Apparently in the alternative it is contended that, as the lessee has the express right under Paragraph 5 to terminate the lease upon the happening of either of two uncertain events, the lease is not sufficiently definite to be valid for any specific term and is therefore a tenancy at will subject to termination upon demand of either party. Hence, under either theory it

[illegible]

As a result of the investigation, it is concluded that, as the investigation has shown, the evidence is not sufficient to establish that the defendant is guilty of the crime charged. The defendant is, therefore, acquitted of the crime charged.

is contended the thirty-day notice of termination given by plaintiff was more than sufficient.

In support of the proposition that the term demised is too uncertain to be enforceable, plaintiff relies primarily upon Stanmeyer v. Davis, 321 Ill.App., 227, where, in a suit for possession, defendant attempted to prove the existence of an oral lease "for the duration of the war^{and} until automobiles are again produced" and "until defendant receives twenty-five automobiles in any one month". The Court, in holding such term so uncertain as to create only a tenancy at will, remarked: "It is not the certainty of the happening of the event but the certainty of the date on which the termination of the lease will take place, that is the determinative factor." Plaintiff urges that the date of termination here is similarly uncertain. However, there is a clear and vital distinction between the terms of the demise in the instant case and that in the Stanmeyer case, as well as those in all of the numerous decisions cited in the Stanmeyer opinion. In none of them was there a fixed term which must end at all events at a time certain but which is subject to termination upon the occurrence of an event that may or may not happen before the expiration of the specified term.

This distinction and the consequences following from it dispose of both of the above mentioned phases of plaintiff's argument under the great weight of the general authorities and the Illinois cases. The applicable rule, as stated in 32 Am. Jur. 82, Landlord

is contained in the chief-justice of the court given by plain-
tiff and more than sufficient.

In support of the proposition that the term "lease" is too
uncertain to be enforceable, plaintiff relies primarily upon State
ex. v. Davis, 361 Ill. 400, 1937, where, in a suit for possession,
defendant attempted to prove the existence of an oral lease "for
the duration of the war" until defendant was again evicted, and
until defendant received twenty-five automobiles in any one month.

The court, in holding such term as uncertain as to create only a
tenancy at will, remarked: "It is not the certainty of the happen-
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larly uncertain. However, there is a clear and vital distinction
between the terms of the lease in the instant case and that in the
foregoing case, as well as those in all of the numerous decisions
cited in the foregoing opinion. In each of them was there a fixed
term which must run out at all events at a time certain and which is
subject to termination upon the occurrence of an event that may or
may not happen before the expiration of the specified term.

This distinction and the consequences following from it dis-
pose of part of the more extended matter of plaintiff's argument
under the first point of the general allegations and the Illinois
cases. The plaintiff's rule, as stated in 32 Ill. 2d, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

& Tenant, Section 66, is as follows:

"Moreover, where a lease is for a definite term of years and complies with the formal requisites of such a term, it creates a tenancy for years and not a mere tenancy at will even though it is made terminable at the option of the lessee, such a lease not being within the application of the foregoing broad rule that a lease or estate, at the will of one of the parties, is equally at the will of the other."

It is stated in 51 C.J.S.657, Sec.91, Landlord and Tenant, that:

"An agreement is not invalid although it gives the lessor or ^{the} lessee alone the right to terminate the lease. The common law rule . . . that an estate at the will of one party is equally at the will of the other, does not render a lease granting such an option to one of the parties terminable at the option of the other party."

The same distinction is implicit in the decision in Adelman v. Carson, Pirie, Scott & Co., 247 Ill.App.574, where the Court remarked:

"It will not be questioned that where a term for a fixed period is created by a lease, a provision for its termination upon an event which may or may not happen before the expiration of the period specified, or a provision for its termination before the expiration of such period at the option of the lessor or lessee, will not prevent it from creating a valid term of years." (See also Poe v. Ulrey, 233 Ill., 56; Bartkowski v. Albert Hoefeld, Inc., 226 Ill., App.198.)

It is urged that the habendum clause, properly construed, created a tenancy of three years unless the tenancy was terminated by either party on thirty days' notice because the word "unless" refers exclusively to the "tenancy", i.e., the fixed term, while the word "until" refers to the indefinite occupancy or holding over of the tenant after the fixed term. In support of this argument plain-

tiff emphasizes that it is the "tenancy" which may be terminated by either party and as the only "tenancy" demised under the terms of the lease is that for the three-year period, it is that "tenancy" and not the holding over thereafter which is subject to termination upon notice by either party. Both parties agree that the only effect of the supplements upon the habendum clause of the lease proper is to substitute the date February 29, 1964, for January 31, 1939, as the end of the fixed term.

If the substance of these contentions is specifically applied to the habendum clause of the lease, its meaning would apparently be as follows: "...to have and to hold the same for and during the term beginning on the 1st day of February, 1936, and terminating on the 29th day of February, 1964, unless the tenancy is terminated by either party by thirty (30) or more days' written notice to the other party, and thereafter until the occupancy is terminated by either party by thirty (30) or more days' written notice of the other party. . ."

Plaintiff asserts that Papulias v. Wirtz, 331 Ill.App.376, is exactly parallel in its facts and conclusively demonstrates that the habendum clause of the lease must be so construed. Examination of the language of the lease in that case, however, clearly shows that the decision is of no aid whatever to plaintiff. There was a demise for a period of three years "unless sooner terminated as hereinafter provided". A subsequent paragraph of the

It emphasizes that it is the "tenant" which may be terminated by either party and at the only "tenant" which under the terms of the lease is that for the entire term period, it is that "tenant" and not the building over which it is subject to termination upon notice by either party. When a lease is made for the only effect of the emphasis upon the duration clause of the lease proper is to substitute the date February 27, 1904, for January 31, 1909, at the end of the fixed term.

If the substance of these conclusions is specifically applied to the duration clause of the lease, the meaning would necessarily be as follows: "...to have and to hold the same for and during the term beginning on the 1st day of January, 1904, and terminating on the 31st day of January, 1909, unless the tenancy is terminated by either party by notice (30) or more days' written notice to the other party, and thereafter until the occupancy is terminated by either party by notice (30) or more days' written notice to the other party. . . ."

It is also noted that Wheeler v. Wheeler, 331 Ill. App. 370, is entirely parallel in its facts and conclusively demonstrates that the duration clause of the lease must be so construed. Examination of the language of the lease in that case, however, clearly shows that the decision is of no aid whatever to this case. There was a lease for a period of three years "unless sooner terminated as hereafter provided". A subsequent paragraph of the

lease gave the lessor "the privilege to cancel this lease and any renewal or extension hereof and any holdover hereunder, at any time during the term, thereby created, by giving to said lessee, ~~£~~. . . sixty days' notice to quit..." A typewritten rider attached to the lease provided: "The lessee may extend the term of this lease for an additional three years...by giving to the lessor a ninety-day prior written notice of ^{his} intention so to do." Before expiration of the original term the lessor gave sixty days' notice of termination of the lease and the only defense in a suit for possession was that the rider providing for extension of the lease was in conflict with and abrogated the provisions thereof for cancellation. As noted above the original fixed term was made subject to cancellation on notice in clear, unmistakable language which could have had reference only to the original term and in a subsequent portion of the lease, also quoted above, the privilege of cancelling any extension of the original term was similarly given. The Court quite properly held that there was no conflict in the several provisions of the lease, that the original term was subject to termination and that had the lessee exercised his option to extend the lease, the extension would likewise have been subject to termination.

In the instant case there is no such clear and explicit provision in the habendum clause for cancellation of the lease by either party during the fixed term thereof which now by supplement

leads have the least "the privilege" to cancel the lease and any
removal or extension thereof and any withdrawal, withdrawal at any time
during the term, however, subject to giving in writing, "the
least" notice of withdrawal. "The lease" is a written lease entered to
the lease agreement: "The lease" is subject to the terms of this lease
for an additional three years... by giving to the lessor a written
notice of withdrawal in writing, "the" before expiration
also of the withdrawal from the lease and which date, notice of
termination of the lease and the only notice in a valid form
possessed and that the lease provided for extension of the
lease and in conflict with and against the provisions thereof
for cancellation. It is noted above the original lease was
not subject to cancellation as before in time, the lease
provisions which would not be withdrawn only to the original lease
and in a subsequent portion of the lease, was stated above, the
privilege of cancellation for extension of the original lease was
stated as given. The Court in its opinion held that there was no
conflict in the lease, withdrawal of the lease, that the original
lease was subject to cancellation and that the lease provided
the option to extend the lease, the extension which is stated here
was subject to cancellation.

In the instant case there is no such clear and explicit pro-
vision in the lease for extension or cancellation of the lease of
least party being the first firm contract with the by agreement

extends to February 29, 1964. To conclude, as plaintiff urges, that properly construed, the habendum clause in fact gives both parties the right to cancel at will, upon notice prior to that time, would be to reform the habendum clause to provide for a demise "for and during the term commencing on the 1st day of February, 1936, and thereafter unless and until the tenancy is terminated by either party by thirty or more days' written notice to the other party..." Such an interpretation can only come from what this Court regards as a strained and unnatural interpretation of the language of the habendum clause effectively deleting any mention of a fixed term clearly specified in the lease as written and in each of the supplements thereto.

That such construction is completely unwarranted is confirmed, if need be, by other aspects of the lease as a whole and the supplements thereto. In addition to making surplusage of the words "for and during the term" and "terminating on the 29th day of February, 1939", plaintiff's construction would make meaningless Paragraph 5 of the lease empowering the lessee to terminate upon the occurrence of certain contingencies. Moreover, under the first supplemental agreement to the lease, defendant was given the option to extend the fixed term from January 31, 1939, to January 31, 1942. Each of the last two supplements extended the fixed term of the lease and the last gave defendant the right to cancel the lease as of the last of February, 1945, or any year thereafter upon

extends to February 29, 1934. To construe, as plaintiff argues, that properly construed, the language in the lease does not give parties the right to cancel at will, upon notice prior to that time, would be to reform the language of the lease to provide for a definite term and during the term commencing on the first day of February, 1930, and thereafter unless and until the tenant is terminated by either party by thirty or more days' written notice to the other party...". Such an interpretation can only come from what this Court regards as a strained and unwarranted interpretation of the language of the habendum clause effectually defeating any mention of a fixed term clearly specified in the lease as written and in each of the supplements thereto.

That such construction is completely unwarranted is confirmed, if need be, by other aspects of the lease as a whole and the supplements thereto. In addition to making suppliance of the words "for and during the term" and "terminating on the first day of February, 1930," plaintiff's construction would make meaningless paragraph 5 of the lease empowering the landlord to terminate upon the occurrence of certain contingencies. Moreover, under the first supplemental agreement to the lease, defendant was given the option to extend the fixed term from January 31, 1930, to January 31, 1932. Each of the last two supplements extended the fixed term of the lease and the last gave defendant the right to cancel the lease as of the last of February, 1935, or any year thereafter upon

ninety days' notice and the payment of a penalty to plaintiff. Plaintiff's construction of the habendum clause would make virtually meaningless each of these supplements and would raise a direct conflict between the habendum clause which, as construed by plaintiff, gave defendant the right to cancel at any time on thirty days' notice, and the last supplement which gave him the right to cancel upon ninety days' notice and payment of compensation to plaintiff.

In the opinion of this Court, it is abundantly clear that the habendum clause of the lease does not give either the lessor or the lessee the right to cancel the lease at any time during the fixed term therein specified which now by supplemental agreement terminates February 29, 1964, but that such right arises under the habendum clause only "thereafter", i.e., after the last mentioned date. The trial court's action in sustaining defendant's motion to strike the complaint and in entering judgment for the defendant was correct in all respects.

The judgment of the Circuit Court is affirmed.

Affirmed.

thirty days' notice and the payment of a penalty of \$100.00. Plaintiff's contention is that the defendant's claim would make virtually meaningless each of these stipulations and would raise a direct conflict between the stipulations which, as contended by plaintiff, have determined the right to cancel at any time on thirty days' notice, and the last stipulation which gave him the right to cancel when ninety days' notice and payment of compensation to plaintiff. In the opinion of this Court, it is abundantly clear that the stipulation clause in the lease does not give either the lessor or the lessee the right to cancel the lease at any time during the fixed term therein specified which now by supplemental agreement terminates February 29, 1934, but that such right arises under the lease due clause only "hereafter", i.e., after the last mentioned date. The trial court's action in sustaining defendant's motion to strike the complaint and in entering judgment for the defendant was correct in all respects.

The judgment of the Circuit Court is affirmed.

Attended.

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45840

IRVING GREENFIELD,

Plaintiff-Appellant and
Cross-Appellee,

and

BENJAMIN F. HAAS, et al.,

Intervenors-Appellants
and Cross-Appellees,

v.

5222 HARPER AVENUE BUILDING CORPORATION,
et al.,

Defendants-Appellees
and Cross-Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

351 I.A. 375

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE
COURT.

This appeal is by plaintiff and certain intervenors from a decree dismissing for want of equity plaintiff's complaint and intervenors' petitions. The cross-appeal is by defendants from that portion of the decree which taxed half of the costs against them.

The essence of plaintiff's complaint is that he is a stockholder in the defendant building corporation; that the officers and directors of the building corporation, in violation of and in disregard of their fiduciary duty to the corporation and its stockholders, were guilty of misapplication and waste of corporate assets, resulting from a net lease of the apartment building owned by the corporation, authorized by said officers and directors and made with defendant Elmo Operating Company, a corporation capitalized for \$1,000, as lessee, hereinafter referred to as Elmo; that the building

corporation and Elmo are controlled and dominated by defendant David Zisook, a director of both companies, and his father, Harry Zisook; and that the lease was originally made for a period of five years and by subsequent action of the directors of the building corporation was twice extended, each for an additional period of five years.

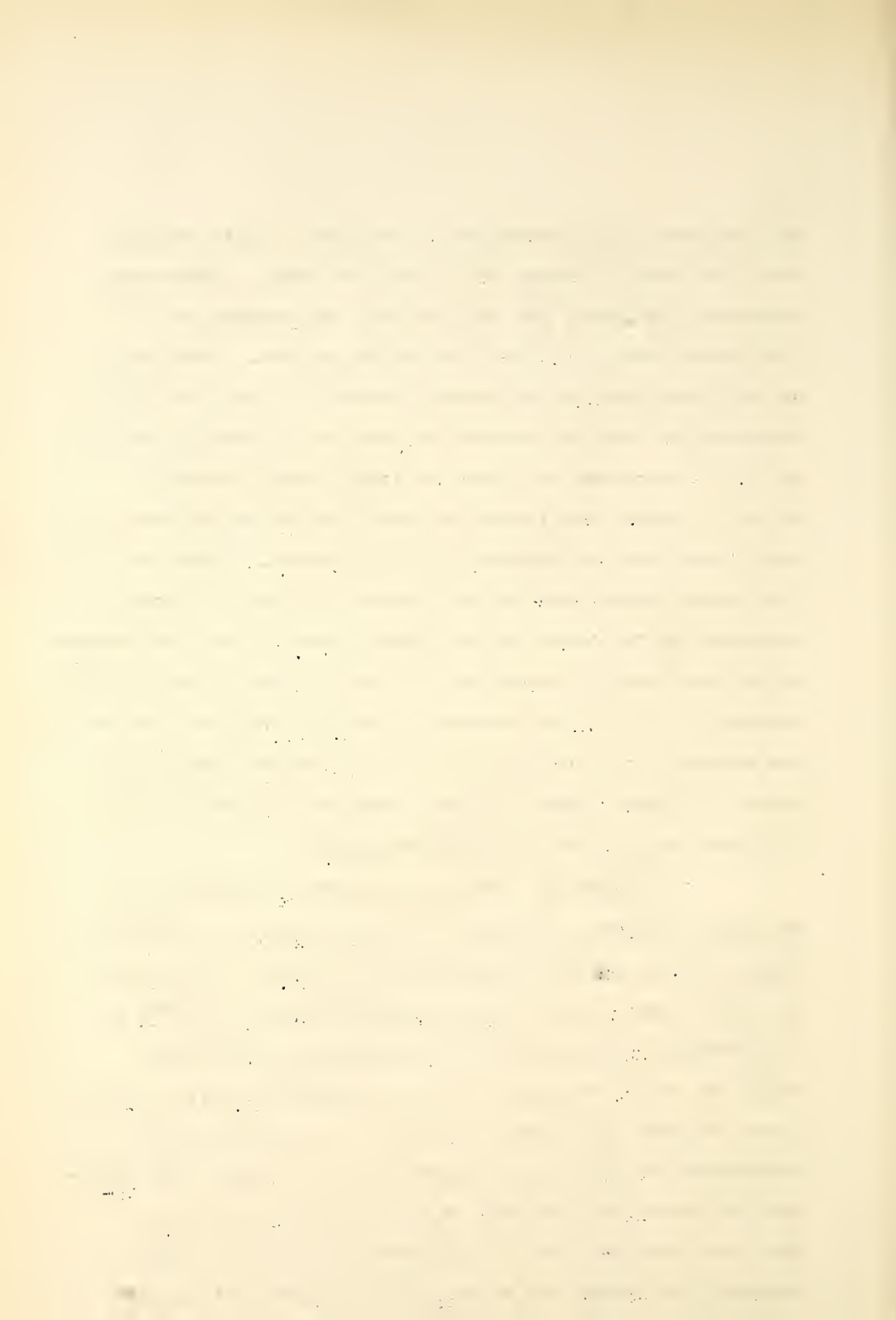
The complaint prayed that the officers and directors of the building corporation be restrained from managing or dealing with the property of the building corporation; that some of the directors be removed from office; that the lease referred to be cancelled and a receiver appointed; and that a decree be entered for liquidation and sale of the corporate assets pursuant to section 86 of the Illinois Business Corporation Act.

The intervening petitioners, who are also stockholders of the building corporation, adopted the allegation of plaintiff's complaint. Upon issue being joined, the cause was referred to a master, who heard the evidence and recommended the dismissal of the complaint and the intervening petitions for want of equity. A decree was entered in accordance with the findings and recommendations of the master.

The evidence establishes the following facts: The building, upon which the present lease in question was made to Elmo, as lessee, is a four-story structure, containing sixty-four completely furnished apartments and four stores. Except for the stores it is operated as an apartment hotel. It was built in 1927 by Harry A. Zisook

and completed with a mortgage of \$250,000. This mortgage went into default during the depression years. Bankruptcy proceedings followed, and the property was reorganized in 1932 under section 77-B of the Bankruptcy Act. Defendant building corporation was formed pursuant to the plan of reorganization, and two classes of stock were issued, Class "A" and "B." One share of Class "A" stock, having certain priority rights, was issued for each \$100 defaulted bond, of which there are now outstanding 2,465 shares. Under the plan Harry Zisook received 247 shares of Class "B" stock, representing the total of such stock issued. When the instant action was brought Zisook and his family owned approximately one-half of all of the outstanding stock. From the time of the reorganization until 1937, the property was managed by Harry A. Zisook & Sons, and they received 7% commission of the gross rentals for building management.

On March 3, 1937, upon Zisook's proposal, the building corporation executed a lease to Elmo, as lessee, a company wholly owned by Zisook and his family. The lease was for a term of five years, commencing April 1, 1937, at a guaranteed monthly rental of \$1,250 and an additional rental of 50% of the monthly gross income over \$3,500. The lease required the lessee to replace all ice boxes with refrigerators and pay the balance due on a stoker, the equipment to become the property of the building corporation. The lease provided that in the event of the sale of the property the lessee was to be given 30 days' notice, and for a payment to the lessee of \$112.50 per month for the unexpired term.



At the expiration of the lease the directors of the building corporation authorized the execution of an extension of the lease for an additional period of five years, from March 31, 1942, with a reduction in the monthly rent from \$1,250 to \$1,125, and changed the terms of the additional rental to 50% of the gross rentals in excess of \$3,350 a month instead of the original gross rentals of \$3,500 a month. It was further provided by the extension that the lessee install new stoves and replace the carpeting. Throughout the rental period to Elmo, Harry A. Zisook & Sons received management fees of 7% of the gross rental charged against the income of the building. The reduction in the guaranteed minimum rental from \$1,250 a month to \$1,125 a month was based upon a showing by the lessee that it had sustained a loss in operation of the property of \$3,500 for the period of three years and five months ending August 31, 1940.

In March, 1947, shortly before the expiration of the ~~second~~ extension period, David Zisook, then a director of the building corporation, requested a further extension of five years from March 31, 1947, and for a further reduction in rent. He agreed on behalf of Elmo, if the extension was granted, to spend \$3,000 additional on equipment in the building, provided there was a reduction in the percentage of additional rental to be paid, from 50% to 33-1/3% of the gross rent in excess of \$3,350 a month. The directors of the building corporation authorized the extension requested upon the modified terms. The extension was executed and later, in accordance with a notice to the stockholders, was submitted

for ratification at a meeting of the stockholders held December 16, 1947. The required majority of stock voted for the approval of the last extension referred to, previously authorized by the board of directors and executed by the building corporation.

In this connection it is earnestly contended by plaintiff that the original lease and the first and second extensions were without compliance with section 157.72, chapter 32 of the Illinois Revised Statutes, known as the Business Corporation Act.

The evidence further establishes that plaintiff acquired his fifteen shares of stock in the building corporation in October, 1946, after he had inquired and learned the facts as to the original lease to Elmo and the first extension. He therefore bought his stock with knowledge of the conditions about which he now complains.

Real estate experts, whose credibility was not attacked, testified that the lease and the extensions to Elmo were fair and reasonable. Plaintiff's expert witness Sherman testified to the approximate income the property should in his opinion produce, and the approximate expense which he considered necessary in the operation of the property. A comparison of his projected figures with those disclosed by the financial statements and records of the building corporation and Elmo does not disclose a radical difference. Defendants construe his testimony and interpret his figures as proving a total loss would result to the lessee of \$4,108.09 during the entire period of operation. Plaintiff's

analysis of his testimony would indicate that a profit would result to the lessee for the period in question, though comparatively small.

Reviewing his testimony and that of the experts for the defendants, we cannot conclude that any substantial profit, regardless of the nominal corporate capitalization of Elmo, resulted to the lessee from the operation. The Zisooks managed this property and received 7% of the gross rentals for their services from the beginning of the re-organization to the time of the hearing before the master. There is no evidence that the property was mismanaged by the Zisooks throughout the period, nor did they charge more for their services and management than prior to the lease to Elmo. The evidence is clear that Harry Zisook, who built the property, and who retained his interest therein, and with his family owned 50% of the outstanding stock, gave the property his best efforts and had every reason for preserving the property instead of permitting it to deteriorate. There is no showing in the evidence to the contrary.

Plaintiff complains that there was no need for a lease to Elmo, and that Zisook should have continued to manage the property so that the stockholders would receive whatever profit inured to Elmo. This complaint is hardly consistent with the previous effort of plaintiff and petitioners to obtain a lease upon this property and failed in their effort. Plaintiff and petitioners also demanded that the building corporation solicit bids for the sale of the property, which the directors refused to recognize. It was after plaintiff's disappointment in securing a lease or forcing a sale of the property that he brought this action.

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Whether the policy of giving a lease to Elmo was sound rested in the legal discretion of the directors in the first instance, and of the stockholders when they ratified the second extension. Equity should not interfere with the internal management of a corporation unless the rights of stockholders have been substantially affected by fraud or illegal conduct on the part of the officers and directors, to whom is entrusted the management of the affairs of the corporation. Hall v. Woods, 325 Ill. 114, 137-138. There was no showing that the stockholders in the instant case were deprived of any substantial profits because of the lease to Elmo. Nor is there anything in the law that requires a corporation to place on the market for sale its corporate property, even when the market is favorable. Plaintiff and petitioners have no right to demand that the building corporation sell its property. It is not at all analogous to the cases where a corporation owns and operates property under a liquidating trust, and where the trust beneficiaries have a right to insist upon a sale of the property.

Plaintiff attacks the validity of the lease and the extensions upon the theory

- (1) That David Zisook was a director of the building corporation when the last extension was voted by the directors, and that at the time of the original lease and the first and second extensions, Harry Zisook dominated and controlled the judgment of the directors of the building corporation;

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- (2) That the lease to Elmo was tantamount to a director or directors engaging in self-dealing with the property of the corporation; and
- (3) That in the execution of the lease and extensions, there was no compliance with the statute already referred to.

The rule is well settled in this State that the relation of directors to corporations is of such a fiduciary nature that transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation, and where the fairness of such transactions is challenged, the burden is upon those who would maintain them to show their entire fairness. Especially is this true where a common director is dominating in influence or in character. Winger v. Chicago Bank & Trust Co., 394 Ill. 94; Geddes v. Anaconda Copper Mining Co. 254 U. S. 590.

Placing this burden upon Zisook and his company, Elmo, we think the evidence sufficiently acquits Zisook and Elmo of the charge of unfairness and bad faith involved in the execution of the lease and the extensions. The master so found, and the chancellor confirmed his findings. We should not disturb the finding of the master, when confirmed by the chancellor, unless it is against the manifest weight of the evidence. Fuller v. Cook, 405 Ill. 32; McKey v. McKean, 384 Ill. 112. A careful consideration of the evidence convinces us that the evidence amply supports the master's findings.

[illegible]

Though the record discloses a technical failure to comply with section 157.72 of the Business Corporation Act in not sending a notice to the stockholders for a meeting to pass upon the contemplated action of the directors regarding a lease to Elmo, as well as the first extension, it does not invalidate the lease. It will be noted that the section in question merely provides that a corporation "may," among other things, execute a lease of substantially all of its corporate property by giving notice to the stockholders for a meeting to vote upon the question. It does not declare such a lease void, if made without compliance, nor is there an express prohibition against making such a lease without first complying. In the absence of such prohibition or declaration of invalidity, we think that the subsequent notice to the stockholders and their action in ratifying the lease, as already indicated, is a substantial compliance with the statute, which is all that is required.

Defendants' cross-appeal from that portion of the decree which taxed half of the costs against them must be sustained. The master having found for the defendants, and the decree having sustained the master's report and dismissed plaintiff's complaint and the intervening petitions for want of equity, no just and equitable reason is assigned why 50% of the taxable costs should be taxed against these defendants. The taxable costs should all be assessed against plaintiff and the intervening petitioners.

Accordingly, the decree is affirmed, except as to that portion of it which taxes half of the costs against defendants, and as to the same, the decree is reversed and the cause is remanded with directions to tax such costs against plaintiff and the intervening petitioners.

AFFIRMED IN PART, REVERSED
IN PART AND REMANDED WITH
DIRECTIONS.

KILEY AND LEWE, JJ. CONCUR.

256 A

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APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

351 I.A. 376

The collision occurred in the intersection of Damen Avenue and Taylor Street in Chicago, a few minutes after one o'clock in the morning. Plaintiff was sitting in the rear seat of the automobile on the right-hand side. The witness Milich was sitting in the rear seat immediately behind the driver. They were traveling south in Damen Avenue, going to their respective homes in East Chicago and Gary, Indiana. The driver and the witness Milich saw the streetcar approaching from the west, more than 200 feet west of the intersection of Damen Avenue. The street lights were on, and visibility was clear. The streetcar was traveling between 7 to 10 miles an hour.



There was a highway stop sign on the south side of Taylor Street just west of the intersection, facing the approaching streetcar, and several people were at that corner waiting to board the streetcar. The sharp conflict in the testimony relates to whether the streetcar failed to heed the stop sign and traveled into the intersection without giving any warning and without stopping for the persons waiting to board the streetcar.

The prejudicial conduct of defendant's counsel and instructions given for defendant, claimed to be erroneous, are the only grounds upon which plaintiff seeks a reversal of the judgment.

In view of the sharp conflict of evidence affecting the question of liability, it became necessary that the jury be properly instructed and the trial free from prejudicial conduct.

Since we are impelled to reverse this judgment for the giving of erroneous instructions, we shall not discuss the alleged prejudicial conduct of defendant's counsel nor whether it was induced by plaintiff, as defendant claims. It probably will not and should not recur upon another trial.

Defendant's instructions Nos. 10 and 11 are complained of, because they are peremptory instructions and include the requirement that plaintiff exercise due care for his own safety, and that a failure to do so precludes recovery. Plaintiff argues that there is no evidence upon which to base any claim that plaintiff failed to exercise





due care; that plaintiff was not the driver but merely a passenger; and nothing shown in evidence from which a jury could determine that plaintiff had not exercised due care. Plaintiff evidently regarded the evidence sufficient to submit the issue of plaintiff's due care to the jury. Plaintiff's given instruction No. 6 charged the jury that the negligence of the driver, if any, should not be imputed to plaintiff, "unless the plaintiff was himself at fault, or by his conduct contributed to such negligence." Plaintiff, having submitted instruction No. 6, is in no position to complain of defendant's instructions Nos. 10 and 11.

Defendant's instruction No. 16, complained of, is a peremptory instruction. It reads:

"The court instructs the jury that the plaintiff was not relieved from the exercise of due care and caution merely because he was a guest or invited passenger in the car in which he was riding; but was bound to use and exercise ordinary care and caution for his own safety. And if you believe from the evidence that the plaintiff at and immediately before his injury failed to exercise ordinary care and caution for his own safety, which caused or contributed to his injury, or that he failed to use his senses and faculties to warn the driver of the car in which he was riding of approaching danger, and that his failure so to do under all the circumstances and conditions in evidence was negligence on his part, which caused or contributed to his injury, then the plaintiff cannot recover and you should find the defendant not guilty."

This instruction imposes a duty upon plaintiff contrary to the settled rule announced in a number of cases. The cases hold that a passenger in an automobile, as a general rule, is under no duty to warn the driver. Smith v. Carter, 302 Ill. App. 235, 239; O'Neal v. Caffarello, 303



Ill. App. 574; Palmer v. Miller, 310 Ill. App. 582; Chandler v. Chicago Transit Authority, 337 Ill. App. 655. It is reversible error to give an instruction imposing a duty greater than that required by law. Mitchell v. Central Illinois Public Service Co., 231 Ill. App. 405; O'Hara v. Central Illinois Light Co., 319 Ill. App. 336, 345; Pappas v. Peoples Gas Light & Coke Co., 350 Ill. App. 541.

"Back seat driving should not be encouraged."  
Greene v. Citro, 298 Ill. App. 25, 30. Especially does this rule apply in the instant case, where the driver admitted he saw the approaching streetcar some 200 feet west of the intersection. There was, therefore, no need of warning him of the approach of the streetcar. As was stated in Smith v. Carter, *supra*:

"A passenger in an auto need not warn the driver of the approach of other autos which the driver sees."

Furthermore, plaintiff could not know that the streetcar would disobey the stop sign and enter the intersection without stopping, if the evidence for plaintiff is to be believed. Under such circumstances, there would be no appearance of any danger to warn about, as required by this instruction.

Defendant's instruction No. 18, also a peremptory instruction, reads as follows:

"If you believe from the evidence that ordinary care on the part of the plaintiff, Daniel J. Price, for his own safety required him, while riding in the car which was driven by another, and in which he was riding as a guest passenger in approaching the said intersection of Taylor Street and Damen Avenue, at the time and place in question, and under all



the circumstances in evidence, to look to ascertain whether or not a streetcar was approaching along the eastbound track on Taylor Street, and he did so fail to look and ascertain, then the court instructs the jury to find the defendant not guilty." (Italics ours.)

What we said concerning instruction No. 16 is equally applicable to this instruction.

For the giving of these instructions the judgment must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

KILEY AND LEWE, JJ. CONCUR.

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257 A

46025

MEDICAL CENTER COMMISSION, a body  
politic and corporate,

Petitioner,

v.

MARGARET BANKS, et al.,

Defendants.

IN RE PETITION OF:

PATSY LA MAGNA,

Petitioner - Appellee,

v.

ETHEL REDLICH,

Respondent - Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

351 I.A. 376<sup>2</sup>

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE  
COURT.

This action originated as a condemnation proceeding  
to condemn a parcel of land owned by petitioner Patsy La  
Magna. There was an award by a jury and judgment upon the  
award.

Petitioner filed his petition, praying for an order  
directing the county treasurer to pay the amount of the  
award to him. The petition alleged that there is of record  
a trust deed dated January 7, 1946, securing a principal  
note in the sum of \$6,000, and that said note had been fully  
paid and discharged by petitioner but remains uncanceled of  
record due to the wrongful refusal of the holder of said  
note and trust deed to return the same for cancellation.

Respondent, Ethel Redlich, filed an answer alleging  
she is the owner of said note; that the same remains unpaid;

1. The first part of the report is devoted to a general description of the project and its objectives. It is followed by a detailed account of the methods used in the study, including the selection of subjects, the design of the experiment, and the procedures for data collection and analysis.

2. The results of the study are presented in the second part of the report. This section includes a summary of the findings, a discussion of the implications of the results, and a comparison of the findings with those of previous studies. The third part of the report is a conclusion, which summarizes the main points of the study and offers suggestions for further research.

3. The fourth part of the report is a bibliography, which lists the sources of information used in the study. This is followed by an appendix, which contains supplementary material, such as questionnaires, interview schedules, and raw data. The final part of the report is a list of references, which provides a comprehensive overview of the literature on the topic.

that there is due and owing a balance of \$3,100; and that the trust deed securing the same is a good, valid and subsisting lien.

Upon a hearing the court found in favor of petitioner; that the said note had been fully paid; that the trust deed is not a valid and subsisting lien; and directed the payment of said award to petitioner. Respondent appeals from the order.

The sole issue raised by the petition and answer was whether the note in question had been fully paid. Upon a hearing petitioner introduced checks showing payments to the person designated in the trust deed, totaling \$6,600. The note was dated January 7, 1946, bore interest at the rate of 5% per annum, and was payable weekly at the rate of \$100. The checks, twenty-three in number, were received in evidence, and petitioner rested his case. Each of the first eight checks in evidence bore the notation that it was in payment of the 1930 West Taylor Street loan (the property covered by the trust deed in question). Of these twenty-three checks, five were for \$100 each, two for \$200 each, thirteen for \$300 each, and three for \$600 each, totaling \$6,600.

The trial court ruled that the checks constituted a prima facie case of payment. Thereupon, respondent called as a witness Harry Freeman, designated in the trust deed as the person to whom the payments should be made, who testified that he represented respondent and handled the original transaction with petitioner, in which the loan was

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arranged, and the note and trust deed executed; that he received the payments shown by the checks in evidence; and that there is approximately \$3,143 balance due upon the note.

In an effort to explain how he arrived at the balance due, a series of questions was asked of this witness, pertaining to another financial transaction with petitioner, involving another loan arranged by the witness on behalf of respondent, to be channeled through a corporation in which petitioner was interested. The trial court evidently sustained objections to these questions, upon the theory that the existence of the second loan was not alleged in respondent's answer.

It was the theory of the respondent upon the hearing, that at the time the payments were made there was no direction by the petitioner as to the application of these payments. To establish that fact the witness Freeman was asked the following questions, objections to which the court sustained:

"Mr. Haas: Q. Were there any directions given to you by Patsy LaMagna at any time after the making of the loan?

"Miss Palumbo: I object to that, Your Honor.

"The Court: Objection sustained.

"Mr. Haas: Did Patsy LaMagna direct you to apply the funds in any manner?

"Miss Palumbo: I object.

"The Court: Objection sustained."

After these rulings of the court, the record discloses that respondent made the following offer of proof:





"At this time I would like to renew the offer of proof by the witnesses, Harry Freeman, Sander Caravello, of the fact that in support of our pleading, that the principal sum of \$3,100 is still due and owing, the facts that immediately subsequent to this January loan made to Mr. La Magna, in April of 1946, Mr. La Magna then made, through the entity of the Medford Brewing Company, an additional loan of some \$15,000, and thereafter which funds were exclusively by Mr. La Magna, and that he thereafter commenced to pay a sum in excess of \$100 per week to Mr. Harry Freeman in payment of both loans, which, at that time, totaled principally \$21,000, and with no directions as to the application of those funds, and that Mr. Harry Freeman applied them equally to both loans, and that in October of 1947, Mr. La Magna and Mr. Sander Caravello came to the office of Mr. Harry Freeman, and requested Mr. Harry Freeman to release the security on the \$15,000 loan which was on the real estate owned by Sander Caravello and that Mr. La Magna at that time agreed----

" \* \* \*

"And that Mr. La Magna agreed that the security on the \$15,000 loan made in April of 1946 could be released and that the sum of \$8,900 which was then due and owing on the \$15,000 loan, made in April of 1946, be paid in full, and that the principal balance then due and owing on the loan of the Petitioner La Magna on his property on Taylor Street in the sum of \$3,100, be paid at the rate of \$100 per month, commencing January 1, 1948, and that is what we propose to have proved.

" \* \* \*

"And that in addition, I want to make an offer of proof to the effect that Harry Freeman would testify, if sworn under oath, that the checks received by him, some of which are allowed in evidence as Petitioner's Exhibits 1 to 23, both inclusive, were made in payment of not one loan, but of several loans, the two loans totaling \$21,000 with no direction on the part of the petitioner here, as to the application of those funds."

An objection to the offer of proof was sustained.

Why the petitioner paid \$6,600 instead of \$6,300, representing the principal and interest at 5%, is not explained in the record. In the absence of any explanation,



a strong inference arises that the payments made were to be applied not only to the amount of the note in evidence, but upon some other obligation owing by petitioner to respondent. We cannot presume that there was an overpayment by mistake. This, together with the fact that the endorsement on the first eight checks evidenced the application of the payments made, while the remaining checks did not have such endorsement, are proper circumstances to be considered as tending to prove that petitioner recognized an obligation other than the one represented by the note. Had the witness Freeman been allowed to testify to the subject matter disclosed by the series of questions asked him and the offer of proof, it would have established how the payments were applied and the reason for payments in excess of the amount of the note in evidence.

The burden of proving payment was upon the petitioner. Having made out a prima facie case of payment, respondent had a right to rebut that proof with competent evidence, to show the application of the payments in the absence of any specific direction by the petitioner. The right to rebut involved a question of evidence, and such evidence would not be incompetent under the pleadings. The questions asked of the witness Freeman were proper to show there was an absence of such direction of application.

In Illinois Refining Co. v. Welch, 341 Ill. 292, at p. 300, the rule is stated:

The first part of the book is devoted to a general survey of the history of the world, from the beginning of time to the present day. The author discusses the various stages of human civilization, from the earliest times to the modern era. He traces the development of the human mind, from the simple instincts of the primitive man to the complex reasoning of the modern philosopher. He also examines the progress of the human race, from the dark ages of ignorance to the bright dawn of science and knowledge. The author's treatment is comprehensive and thorough, covering all the major events and figures of world history. He provides a clear and concise summary of the human story, from the beginning to the end. The second part of the book is devoted to a detailed study of the human mind. The author explores the various faculties of the mind, such as memory, imagination, and reason. He discusses the different theories of the mind, from the ancient Greeks to the modern psychologists. He also examines the various factors that influence the mind, such as environment, education, and heredity. The author's treatment is thorough and detailed, covering all the major theories and figures of the history of psychology. The third part of the book is devoted to a study of the human race. The author examines the various races of the world, from the primitive to the modern. He discusses the different characteristics of each race, such as physical features, mental faculties, and social customs. He also examines the various factors that influence the development of the human race, such as environment, education, and heredity. The author's treatment is thorough and detailed, covering all the major theories and figures of the history of anthropology. The fourth part of the book is devoted to a study of the human future. The author examines the various theories of the future, from the optimistic to the pessimistic. He discusses the different factors that will influence the future of the human race, such as science, technology, and environment. He also examines the various challenges that the human race will face in the future, such as war, poverty, and disease. The author's treatment is thorough and detailed, covering all the major theories and figures of the history of futurology.

"Where a debtor at the time of making a payment fails to direct its application the creditor may apply it as he pleases upon the different debts due him. Where neither the debtor nor creditor makes such application of a payment the law will apply it first to the debt for which security is most precarious."

Earlier cases announced the same rule. Monson v. Meyer, 93 Ill. App. 94, 98, affirmed in 195 Ill. 142, and cases there cited.

The trial court erred in sustaining objections to those questions and to the offered proof.

The judgment of the Circuit Court is reversed and the cause remanded with directions for further proceedings consistent with the views expressed.

REVERSED AND REMANDED  
WITH DIRECTIONS.

KILEY AND LEWE, JJ. CONCUR.





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46035

ADAM J. MANXI and KALIL A. MEZHER,  
trading as STEINBOCK & ALEXANDER,

Appellees,

v.

HILDA KIMBLEY,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

351 I.A. 377

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiffs, licensed real estate brokers, instituted suit to recover a commission for procuring an alleged purchaser of defendant's hotel including fixtures and equipment. There was a jury trial, verdict, and judgment in favor of plaintiffs for the sum of \$6,000.

The amended complaint consists of four counts.

At the close of plaintiff's case three counts were withdrawn and the cause was submitted to the jury on the first count. This count alleged in substance that plaintiffs were "orally employed" by defendant to procure a purchaser of the hotel located at 5010-16 south Harper Avenue in the City of Chicago, Illinois, for \$120,000 payable as follows: \$2,500 as earnest money, \$32,500 upon the delivery of a deed and bill of sale, and the remainder of \$85,000 in monthly installments of \$784.40 each, with interest at 4-1/2 per cent; that plaintiffs procured one Irving Greenberg who executed a written contract to purchase defendant's hotel in accordance with the defendant's terms, and that defendant "agreed to pay plaintiffs an amount equal to five per cent" of the purchase price.



In her answer defendant admitted selling the hotel to other persons for \$123,500 but denied that the terms of the written contract tendered by Greenberg conformed to the proposal made by defendant.

Plaintiff Mezher and defendant testified to diametrically opposite versions of the facts relating to the amount of the purchase price, the terms of payment, and the broker's commissions. Defendant testified that she told Mezher the purchase price was \$139,000 payable not less than \$45,000 in cash which included an earnest money payment of \$7,000; and that she would "carry the balance over a period of twelve years." During the first conversation with Mezher in May 1948 defendant said she gave him a typewritten sheet of paper "made up for all the brokers" containing the terms of sale. Mezher admitted receiving such a typewritten statement from defendant but did not produce it at the trial. When Mezher tendered the contract of purchase signed by Greenberg to defendant on September 30, 1948, she refused to sign, according to Mezher's testimony, on the ground that she had received "a better offer."

The evidence discloses that Mezher was permitted to testify that on October 6, 1948 he told defendant that he was going to sue for commission, and that defendant replied, "You go ahead; I am protected by Mr. Forman and Mr. Smalley." When the question relating to an indemnifying agreement was first propounded to Mezher defendant's counsel objected on the ground that it was immaterial. This objection was sustained. Afterward the question was

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presented in another form and the witness was allowed to answer. We think the jury could reasonably infer from this evidence that a judgment against the defendant would be satisfied by other persons.

Defendant contends that evidence of an indemnifying agreement to protect the defendant against the payment of a broker's commission was improper. We think there is merit in this contention. In the present case the liability, if any, is primarily that of defendant and the admission of the evidence complained of is therefore prejudicial. (Clark v. Hasselquist, 304 Ill. App. 41.)

Joseph A. Myers, called by plaintiffs, testified that in 1947 or 1948 defendant listed the premises here in controversy with him at \$139,000 "for negotiating purposes"; that defendant told the witness that she would accept \$110,000; that thereafter the witness submitted proposals to defendant from prospective purchasers of her hotel for \$110,000 and \$115,000, respectively, which defendant refused.

Defendant insists that evidence of transactions between defendant and other real estate brokers is irrelevant. This evidence was inadmissible for the reason that these transactions were in no way connected with the transactions between plaintiffs and defendant. See Merritt v. A. W. Boyden & Son, 93 Ill. App. 613.

Greenberg, the alleged purchaser procured by plaintiff, subleased office space from plaintiffs. He died in November of 1951. In order to establish that Greenberg was



financially able to purchase defendant's premises, plaintiff Manxi testified in substance that Greenberg, whom he had known since 1945, was worth \$1,500,000; that he had oil fields and oil leases, and manufactured linen, carpets and rugs; that Greenberg had a factory which the witness had never seen "some place down south"; that he never saw the oil wells; that Greenberg owned a hotel, parking lot, and a 48-apartment building in the City of Chicago. The petition for admission of Greenberg's will in the Probate Court of Cook County, Illinois, which appears in the record, states that Greenberg at the time of his death left no real estate in Cook County. With respect to Greenberg's assets Manxi's testimony is in our view hearsay and should have been excluded. Moreover, we think that the exhibits 5, 6, 7, 8, 9 and 10, which are petitions signed by the executors of Greenberg's estate filed in the Probate Court of Cook County, and orders entered by that court, are not competent for the purpose of proving the ability of Greenberg to purchase the premises here involved at the time the Greenberg contract was tendered to defendant.

The Greenberg contract was prepared on a printed form in common use in the City of Chicago. On the reverse side appears a typewritten provision which reads "Seller warrants that four of the stores and the garage upon the premises are subject to a lease expiring March 31, 1951, with monthly rental of \$5,000." The uncontroverted evidence shows that the building contained only one store on the first floor, leased to a Packard automobile agency, and a garage.





This tenant had occupied the premises for about three years. Manifestly the warranty was untrue, hence the contract could not have been enforced against Greenberg had the defendant executed it. Plaintiffs say that this provision is waived because defendant did not raise the objection when she rejected the Greenberg contract. A waiver is the intentional relinquishment of a known right, and there must be both knowledge of the existence of the right and the intention to relinquish it. So far as the evidence shows plaintiffs did not tell defendant of this provision in the Greenberg contract nor does it appear that she had any knowledge of it.

Defendant complains of two peremptory instructions given at the request of plaintiffs. The first instruction recites all the material allegations of Count 1 of the complaint. Criticism is leveled at that portion of this lengthy instruction which states in substance that if the jury believe from a preponderance of the evidence that defendant agreed to pay plaintiffs an amount equal to five per cent of the sale price then plaintiffs are entitled to recover from defendant. Defendant admits that during her first conversation with Mezher he asked "about the commission" but there was no testimony tending to show that defendant agreed to pay plaintiff five per cent of the purchase price or any other sum. In the absence of such proof this instruction was improper.

In the other instruction the jury were told in effect that plaintiff could recover if the jury found that five per cent was the usual and customary compensation for



plaintiffs' services. Count 1 was framed on the theory that the compensation was agreed to between the parties. Evidence tending to show that the compensation claimed by plaintiffs was usual or customary, was not admissible under this Count and therefore the instruction should have been refused. In the view we take of this case it is unnecessary to consider the other points raised.

For the reasons given, the judgment is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND THE CAUSE  
IS REMANDED FOR A NEW TRIAL.

FEINBERG, P.J. AND KILEY, J., CONCUR.



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46063

ANN LEWIS HARRELL, MARIE LEWIS  
FORTUNE, LUTHER LEWIS, and JOHN  
LEWIS (substituted for MELVIN  
LEWIS, now deceased),

Plaintiffs below.

ANN LEWIS HARRELL,

Appellant,

v.

HATTIE LEWIS,

Appellee.

APPEAL FROM

CITY COURT,

CHICAGO HEIGHTS

351 I.A. 506

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE  
COURT.

Substituted plaintiffs appeal from a decree  
vacating a prior decree of divorce and dismissing the  
complaint for want of equity.

On October 10, 1952 Melvin Lewis procured a decree  
of divorce from the defendant. He died two days later.  
November 8, 1952 defendant filed a petition alleging  
the death of the plaintiff on October 12, 1952, leaving as  
his next of kin defendant, his widow, two sisters and two  
brothers, and setting up certain grounds for the vacation  
of the decree of October 10th and the dismissal of the  
complaint. On the same day an order was entered substituting  
the surviving sisters and brothers as parties plaintiff.  
Leave was given them to answer and the matter set for  
hearing on November 29, 1952. An answer was filed by the  
substituted plaintiffs and on November 29th the cause  
was continued to December 13, 1952, at which time, on  
hearing had in open court, an order was entered setting aside





-2-

the decree of divorce and dismissing the complaint for want of equity. No report of proceedings has been filed and we must therefore presume that the facts before the court supported the order appealed from. It is affirmed.

ORDER AFFIRMED.

BURKE and FRIEND, J.J., Concur.



263

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46076

SIDNEY ASHER,  
Appellee.

V.

JOSEPH R. APPLEBAUM and IRWIN  
M. BLOOMFIELD,  
Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

351 I.A. 507

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE  
COURT.

Defendants appeal from a decree for \$2,000 with interest and costs against the defendant Applebaum and a declaration of an equitable lien for said sums upon property conveyed by Applebaum to the defendant Bloomfield.

The complaint and evidence show that on December 9, 1948 Applebaum entered into a written contract to sell the real property described therein, being a 3-story residence at 1620 Chase Avenue, Chicago, to plaintiff for \$28,750; that plaintiff paid \$2,000 as earnest money and agreed to pay the balance within five days when title is shown to be good or is accepted by him if proper deed is tendered; that the opinion of title showed certain defects which Applebaum failed to remove; that plaintiff recorded the contract in the office of the recorder of deeds of Cook county on January 21, 1949; that defendant having failed to cure or remove the objections to title, plaintiff served a written notice on defendant on March 10, 1949 demanding a return of the earnest money unless the defects were removed within ten days. The defects



were not cured. On April 17, 1949 Applebaum entered into a written agreement to sell the property involved herein to defendant Bloomfield and in the same month executed a deed conveying the property to him. The sole grounds of appeal urged by the defendants are the want of jurisdiction in a court of equity and the alleged errors of the master in chancery in his rulings on the admissibility of evidence.

On oral argument defendants' counsel contended that the action for an equitable lien could not be maintained because plaintiff had rescinded the contract on the ground that defendant had failed to show good title. This position is untenable. 55 Am. Jur., Vendor and Purchaser, sec. 550. There being grounds for an equitable lien prayed for by plaintiff, the court of equity had jurisdiction. Having taken jurisdiction for the purposes of determining plaintiff's right to an equitable lien, it had jurisdiction to try defendant's counterclaim for damages for plaintiff's alleged breach of contract which defendant voluntarily submitted to the court.

The objection to the rulings of the master in chancery on the admissibility of evidence is not preserved for review. There was no offer of proof. Chicago City Ry. Co. v. Carroll, 206 Ill. 318, 328-329. The proper method of preserving for review rulings of a master in chancery is stated in Ritholz v. Andert, 303 Ill. App. 61, 69-70.

The decree is affirmed.

AFFIRMED.

BURKE and FRIEND, JJ., Concur.



46112

FRANK SEROCK,  
Plaintiff and Counterdefendant,  
Appellee,

v.

STANLEY SENKIEWICZ, et al.,  
Defendants and Counterclaimants,  
Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

351 I.A. 508<sup>1</sup>

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE  
COURT.

Defendants and counterclaimants appeal from a judgment for \$50 against the defendant Stanley Senkiewicz and from a judgment for plaintiff on defendants' counterclaim.

This suit grew out of a family quarrel. Plaintiff sued his sister, Emma Senkiewicz, and Stanley her husband for an assault on June 12, 1949. Defendants answered and filed a counterclaim for damages based on an alleged assault by plaintiff upon his sister Emma at the same time and place stated in the complaint. At the close of plaintiff's case the defendant Emma was dismissed from the action. The jury returned a verdict finding the defendant Stanley guilty and assessing plaintiff's damages at \$50. Judgment for plaintiff was entered on this verdict December 18, 1952. The jury also returned a verdict finding the plaintiff not guilty on the counterclaim. Judgment on this verdict, although irregular in form, was entered on December 18, 1952. Defendants changed attorneys, who filed a motion for new trial on January 14, 1953. On the same day the court overruled





this motion on the ground it was filed too late and that no error occurred in the proceedings. The motion for new trial is referred to in the abstract of record and in the brief of appellants as a motion for a new trial and to vacate the judgment. The motion is solely a motion for a new trial and the grounds stated therein are matters which can be raised and preserved only in a motion for new trial. As the motion was filed more than ten days after the entry of the judgments, it is ineffective for all purposes. Schumacher v. Liesemeyer, 343 Ill. App. 455. This holding is not affected by the irregularity of the entry of the judgment on the counterclaim. The judgment as entered is plainly a misprision of the clerk and can be corrected at any time on motion, the verdict of the jury being a sufficient basis for the correction.

Notwithstanding our holding that the motion for new trial came too late, we have examined the record and find no basis for the granting of a new trial. No complaint is made that the verdict on the counterclaim is contrary to the manifest weight of the evidence. We find no prejudicial error in any of the instructions given the jury. The judgments appealed from are affirmed without prejudice to the right of the plaintiff to have the judgment on the counterclaim corrected to conform to the verdict thereon.

JUDGMENTS AFFIRMED.

BURKE and FRIEND, JJ., Concur.



265 A

46121

THE PEOPLE OF THE STATE OF  
ILLINOIS,

Defendant in Error,

v.

CARMEN A. LAUTZENHISER,  
Plaintiff in Error

ERROR TO

MUNICIPAL COURT

OF CHICAGO

351 L.A. 508<sup>2</sup>

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE  
COURT.

Defendant appeals from a judgment for \$25 and costs entered against her in a prosecution for alleged violation of section 377 of the Criminal Code (Ill. Rev. Stats. 1951, chap. 38, par. 377) providing that "If any person shall, by threat, intimidation or unlawful interference, seek to prevent any other person from working or from obtaining work at any lawful business, on any terms that he may see fit, such person so offending shall be fined not exceeding \$200."

The information charged that the defendant operated a certain Ford Tudor sedan "in such a manner as to interfere with employees attempting to go to work in the International Harvester Co., West Pullman Plant \*\*\*." The state should have confessed error. The objections to the information are elementary and have been sustained by an unbroken line of Illinois decisions. The state ignores these decisions and cites authorities from other states. The employees with whom defendant is charged with interfering are not named, and the complaint is for this and other reasons vague, indefinite and uncertain.



People v. Rice, 383 Ill. 584; People v. Robertson, 328 Ill. App. 590 (abst.); People v. Allen, 345 Ill. App. 479 (abst.). The objection may be raised on review. People v. Green, 368 Ill. 242. Furthermore, the evidence failed to support the charge. The only witness called for the prosecution testified that he did not know any of the people who went toward or went to the plant of the Harvester company, and did not know of his own knowledge what their business was in the plant. There was no proof that the persons alleged to have been interfered with were employees of the company.

The judgment is reversed.

REVERSED.

BURKE and FRIEND, JJ., Concur.





266

A

46163

LUCY BUGGS, AMANDA WILLIAMS  
and O. B. WILLIAMS,

Appellants,

v.

ZOLA HILL,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

351 I.A. 509

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE  
COURT.

Three heirs of Ponder Howard, deceased, appeal from a decree dismissing for want of equity their complaint to cancel an assignment and deed executed by them and the remaining heirs of decedent assigning their interest in a contract of decedent to purchase the real property improved by a 6-flat building at 4813-15 Calumet avenue in Chicago, and quitclaiming their interest in said property.

Ponder Howard died intestate April 23, 1943. His heirs were the plaintiffs--his mother Amanda Williams, his half-brother O. B. Williams, his sister Lucy Buggs--and three sisters who joined in the instruments sought to be set aside but refused to join as plaintiffs in this suit. He was never married. He and the defendant lived together as husband and wife from 1932 to the death of decedent. As a result of this relation a child was born who was 17 years of age at the time of the hearing of this cause. In addition to the premises involved herein, decedent and defendant were in possession of a 6-flat building at 4316-18 Calumet avenue which they were



purchasing under a contract entered into by decedent in 1935. They were also operating two other buildings under leases. He was a professional gambler and ran card and dice games in the buildings he had contracted to purchase. Defendant worked with him in the gambling business and did menial work such as cleaning and scrubbing in the buildings Ponder and she were operating. The rents from these buildings and the income from the gambling were kept in a strong box in the living apartment of Howard and defendant. She had the key to the box. In 1935 when Howard contracted to buy the first building, she took \$3800 from this box to make the down payment, and when the building involved herein was purchased in 1943 she took \$2500 from the box to make the first down payment. Monthly payments on the contracts to purchase and the rent of the leased premises were taken from the box or from the rentals of the buildings and the profits of the gambling in the operation of which Howard and defendant cooperated.

On the day following Howard's death defendant was appointed administratrix on the petition of a cousin, a Mrs. Morgan living in Chicago. She never functioned as administratrix. Immediately on the death of Howard she communicated with the plaintiff O. B. Williams, herein-after referred to as Williams, then living in Texas. He promptly came to Chicago and on Monday, April 26th, Williams and defendant conferred with Harris B. Gaines, the



attorney who had procured the letters of administration, in reference to procuring money from the safety deposit box for the expense of the funeral and the conveyance of the body to the south for burial. According to Williams, defendant wished to employ the attorneys who had handled the real estate transactions hereinbefore mentioned. She told Williams that Howard had intended to provide for the education of their daughter and to make other provision for the child; that the property had been acquired through the joint efforts of herself and Howard; that she threatened litigation unless the property at 4316-18 Calumet avenue was conveyed to her. After consultation with the remaining heirs an agreement was reached whereby defendant was to acquire Howard's interest under the contract to purchase the property at 4813-15 Calumet avenue, and the instruments now sought to be set aside were executed.

Defendant never collected any of the rents of the buildings as administratrix. She never filed an account in the Probate court and was never ruled to do so. In July 1943 she took possession of the premises involved herein and has since managed and controlled the property as her own, making payments as provided in the contract. In September of 1948 Aaron McBride, a son of a sister of decedent and then the owner of his mother's interest in the estate, filed a petition in the Probate court of Cook county to require an accounting by Williams as to the



rents and income of the property belonging to the estate. He was later ordered to make the accounting. Defendant testifies without contradiction that about the time the proceedings for the accounting were commenced Williams came to her and asked that she get him \$3,000 by placing a mortgage on the property held by her, stating that he was in a mess on account of the income of the property. She refused. Two weeks later she was served with summons in this case.

The second amended complaint, on which the cause was tried, charges that defendant specifically represented to the plaintiffs, individually and collectively, that she would collect all the assets of the estate of Ponder Howard, deceased, and render an accounting to all of the heirs for all of the assets so collected; that in order to do this it would be necessary for the plaintiffs and each of them to sign a quitclaim to defendant of any and all interest the said heirs might have in the assets of the estate. These allegations are denied. A hearing was had before a master, who reported finding the issues for the defendant and recommending that the complaint be dismissed. The report was approved and the suit dismissed. Neither the mother nor the sister of decedent, plaintiffs herein, testify to any representations made by the defendant to them in respect to the collection of the assets of the estate or the quitclaiming of their interests in the estate to defendant. Gaines testified that Williams





told him of defendant's claim against the estate; that he, Gaines, replied that he did not know the facts; that defendant might have a claim; that Williams stated that the lawyer whom defendant wished to employ had made a similar statement; that Williams said he wanted Gaines to continue handling the estate; that later Williams said he had conferred with the other heirs, that they had agreed to assign and quitclaim to defendant their interest in the property involved herein, and requested Gaines to prepare the necessary papers. The defendant was examined before the master under section 60 of the Practice act and her testimony in respect to her relations with Howard, the work she did in connection with the buildings and the gambling operations, the custody of the proceeds therefrom, etc., were elicited by plaintiffs and is uncontradicted. It is also uncontradicted that defendant never acted as administratrix of the estate; that Williams immediately took and retained possession of all property. There is therefore no basis for the claim of confidential relation between defendant and the heirs. In so far as there is any conflict in the evidence, it is between the testimony of Williams on one side and the defendant and Gaines on the other. That conflict was resolved against plaintiffs and in favor of defendant. The findings of the master are not against the manifest weight of the evidence, they have been approved by the court and will not be set aside.

The decree is affirmed.

AFFIRMED.

BURKE and FRIEND, JJ., Concur.



267 A

45966

PATRICK NEWER, a minor, by IRVING  
NEWER, his father and next friend,

Plaintiff-Appellant,

v.

CHARLES COOK,

Defendant-Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

351 I.A. 510

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

The trial of an action for personal injuries suffered by Patrick Newer, a minor, when he was struck by an automobile, resulted in a verdict and judgment for the defendant, Charles Cook, to reverse which plaintiff appeals.

At about 5 P.M. on August 5, 1948, Patrick Newer, a boy then 10 years old, left Belmont Harbor in Lincoln Park, Chicago, where he had been fishing with 2 playmates, both older than he. He was returning on foot to the vicinity of his home, located west of the Outer Drive and north of Addison Street. The west edge of that portion of Lincoln Park was bordered by 4 eastern lanes of the Outer Drive, which were used for northbound express traffic, and which were commonly referred to as an express drive. The express drive, in turn, was divided by a narrow parkway which separated the drive into two 4 lane drives. Immediately adjacent to and west of the 8 lanes for express traffic is a 4 lane drive for local traffic. The eastern extremity of Addison Street met with but did not cross nor intersect the express drive, the pavement of Addison Street



having been barricaded across its width at the western edge of the express drive by cement posts, the tops of which were connected to each other by a continuous board. That barricade was connected to the parkway by means of chains strung horizontally at various heights. Parallel to, or directly opposite from, this barricade, a similar barricade existed on the eastern side of the express drive. The chains from the ends of the latter barricade were attached to a wire fence which circumscribed the perimeter of that portion of Lincoln Park.

The boys walked northerly to the outer edge of Lake Shore Drive, where Addison Street cuts through but is barricaded. A few hundred feet to the northeast were numerous ball fields and tennis courts and immediately to the east was a totem pole surrounded by a lawn. When the boys arrived at a point between the end of the fence and the south end of the barricade on the east or park side, the plaintiff's companions went on ahead of him across the drive, and the plaintiff, having climbed over the chains, proceeded to cross to the west side of the express drive, alone. There were no crosswalks marked or painted on the pavement of the express drive in that area. Since 1942 there was a pedestrian underpass a short distance to the north, affording ingress and egress from Lincoln Park at that barricaded eastern extremity of the Addison Street pavement. Signs reading "Please use the Underpass" were located near the barricades. A nearby pedestrian





cautioned the plaintiff to use the underpass. The peak of the 5 o'clock rush hour had begun and traffic was heavy.

When the plaintiff darted from the east curb toward the west curb of the express drive, he ran fast and passed the first and second lanes without incident. Upon running past the third lane, a northbound automobile in that lane narrowly missed striking him. Traveling alongside of that car was another car in the fourth lane, driven by the defendant Charles Cook, who had driven north on the express drive from North Avenue. Defendant's car was equipped with good tires, four wheel hydraulic brakes, and was in good mechanical condition. It had proceeded straight along the middle of the fourth lane, the left side being about one and a half feet from the parkway, the right side being about the same distance from the dividing line between the third and fourth lanes. The car in the third lane which narrowly missed striking plaintiff was alongside and a little ahead of defendant's car, the rear bumper of the car in the third lane being about even with the front bumper of defendant's car.

As the two cars approached or were about to pass the south edge of the barricaded area, the car in the third lane was still ahead of defendant's car, the front of the latter car being approximately abreast of the middle or driver's door of the car in the third lane. By the time the two cars had reached



~~24-~~  
this position the plaintiff had darted from the east side in a somewhat northwesterly direction across the first and second lanes and was in the process of narrowly escaping from the path of the car in the third lane by running into the fourth lane, when he became visible or apparent to the defendant, whose car was then about 6 feet away. The defendant applied the brakes of his car and the plaintiff attempted to leap or jump to the parkway, when the left front fender or the left front of the car came in contact with him. Immediately after the impact defendant's car came to a stop, facing across the dividing line between the third and fourth lanes, even with or a little north of plaintiff, who was found lying in the parkway north of the north curb of Addison Street. Plaintiff was removed to a hospital. He suffered serious injuries.

The testimony favorable to the defendant shows that at and about the time of the occurrence he was driving his automobile at a speed of 35 to 40 miles an hour, which was about the same speed as the other traffic moving north on the express driveway at that time and place. Six witnesses who testified for the defendant substantiated the above statement of fact. Plaintiff, one of his companions and a police officer testified for the plaintiff.

We turn to a consideration of plaintiff's contention that the judgment is against the manifest weight of the



evidence. The jury resolved all disputed questions of fact in favor of the defendant. The evidence shows that the defendant, a mature man, was driving his automobile north in the fourth lane from the east edge of the express drive and the first lane west of the parkway that divides the 2 four lane drives of the express portion. He was on his way home, traveling at about 35 to 40 miles an hour, which was about the same speed as the other traffic moving north on the drive at that time and place. There was a great deal of traffic to his right and his front bumper was about even with the rear bumper of the car that was in the next lane east of his, when the plaintiff ran from the east to the west in front of the oncoming traffic and into the path of a car which was in the third lane, almost being struck by this car, and then into the path of defendant's automobile when it was about 6 feet from him. The defendant applied his brakes too late to avoid the collision and the plaintiff was struck. Defendant brought his car to a stop within a reasonable distance. There was evidence that the first opportunity defendant had to see the plaintiff was when plaintiff ran from in front of the car to the right into the path of defendant's car.

The defendant had used that portion of the Outer Drive almost every day for approximately 5 years prior to the time of the occurrence. He knew of the existence of the barricade and the underpass. He had no reason to believe that a child would be upon the highway at



this point. He drove along with the traffic. He did all that he or any reasonable man could be expected to do under the circumstances. He was not guilty of negligence. The verdict of the jury is amply supported by the evidence.

Plaintiff maintains that defendant was guilty of willful and wanton misconduct in the manner in which he was operating his automobile. The statement of facts establishes that there is no basis for the charge of willful and wanton misconduct. It follows that the court did not err in striking the willful and wanton count of the amended complaint. Plaintiff contends that the court erred in striking subparagraph (d) of Paragraph 5 of the first count of his complaint, charging that the defendant was negligent in failing to decrease the speed of his vehicle when approaching and crossing the intersection. The police, under their delegated powers, had barricaded the 8 lanes of traffic set aside for express traffic. There were crosswalks painted across the 4 lanes for local traffic on the west side of the 12 lanes. There was an underpass for the convenience of pedestrians who could pass under the 8 lanes of express highway. There was no intersection, within the meaning of the statute, at the place where the mishap occurred, and the court was right in striking that subparagraph.

Plaintiff also urges that the court erred in striking subparagraph (e) of Paragraph 5 of the amended





complaint, which charged the defendant was negligent because he failed to decrease the speed of his vehicle where a special hazard existed with respect to pedestrians. Plaintiff states that it is "safe to presume that he [defendant] knew that there was a recreational section alongside and that children might attempt to cross there," and that for these reasons he should have decreased his speed as he approached. We agree that defendant probably knew that there was a recreational section in the park. Under the circumstances, as delineated, he could not be expected to decrease the speed of his car. In our opinion there was no evidence to support subparagraph (e) of Paragraph 5, and the court was right in striking it.

Plaintiff asserts that the court erred in striking subparagraph (f) of Paragraph 5 of the amended complaint, which charged that the defendant was negligent in failing to decrease the speed of his vehicle "as may have been necessary to avoid colliding with any person on or entering the highway in compliance with legal requirements and the duty of all persons to use due care." Plaintiff also contends that the court erred in striking subparagraph (i) of Paragraph 5, which charged the defendant with negligence in failing to exercise ordinary care to discover the presence of the plaintiff upon the highway in sufficient time in order to avoid striking him. We are of the opinion that other paragraphs of the complaint covered these charges and that the court



did not err in striking them. In addition to the general charge of negligence, the complaint charges that defendant operated his vehicle at a rate of speed greater than was reasonable and proper so as to endanger the life and limb of the plaintiff; that he operated his vehicle at an excessive rate of speed, having due regard for all circumstances; that he failed to keep a proper lookout in the direction in which he was traveling of persons lawfully upon the highway so as not to strike said persons; and that he failed to exercise proper precautions upon observing a child upon the roadway.

Plaintiff states that the court erred in allowing counsel for the defendant to examine Joseph Merkle, a witness for the plaintiff, beyond the scope of direct examination. We are satisfied that the cross-examination of this witness was not beyond the scope of the direct examination. Plaintiff also asserts that the court erred in allowing photographs to be introduced in the absence of preliminary proof as to their truth and correctness. In our opinion proper preliminary proof was made for the introduction of these photographs. Plaintiff states that the court erred in refusing to strike the testimony of the defendant's witnesses regarding the speed of defendant's automobile in the absence of proof that they observed it for a sufficient time and were able to make a reliable estimate. The witnesses who testified as to

1890  
The following is a list of the names of the persons who have been elected to the office of Justice of the Peace for the year 1890. The names are given in alphabetical order of their surnames. The names of the persons who have been elected to the office of Justice of the Peace for the year 1890 are as follows: [illegible text]

[illegible text]

[illegible text]

the speed of defendant's car observed that car and the court properly allowed them to testify as to the speed of the car.

Plaintiff urges that he did not receive a fair trial because of prejudicial remarks and comments of the court and counsel for defendant and erroneous rulings regarding the admissibility of evidence. We have read the transcript of the proceedings at the trial, and are convinced that plaintiff had a fair trial, and that his contention that prejudicial remarks by the court and counsel and erroneous rulings concerning the admissibility of evidence deprived him of a fair trial, are without merit.

For the reasons stated, the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

NIEMEYER, P. J., and FRIEND, J., Concur.





46014

JOSEPH VERLINDEN,

Appellee,

v.

CRAFTON TURNER, J. LEE, doing  
business as LEE AUTO REPAIRS,  
and HOWARD CLEMONS,

Defendants,

HOWARD CLEMONS,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

351 I.A. 511

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Joseph Verlinden filed a statement of claim in the Municipal Court of Chicago against Crafton Turner, J. Lee and Howard Clemons to recover damages of \$500. Howard Clemons filed an appearance and jury demand. On May 1, 1952, the cause was dismissed at plaintiff's costs as to the defendant Clemons. On May 29, 1952, plaintiff filed in the office of the Clerk a written motion to vacate the order of dismissal. On June 4, 1952, the attorneys for plaintiff served a notice on the attorneys for Clemons that on June 6, 1952, they would petition the court to vacate the order of dismissal. On June 6, 1952, plaintiff moved the court to vacate the order of dismissal. A motion was entered and continued to June 13, 1952. On that day Clemons filed written objections questioning the jurisdiction of the court to entertain the motion. The motion was again continued to June 26, 1952, at which time the court reinstated the cause as to Clemons and transferred it to the Chief Justice for



reassignment. Clemons, appealing, asks that the order reinstating the cause as to him be reversed and that the order of May 1, 1952, dismissing the cause as to him, be reinstated.

Plaintiff has not filed an appearance or briefs.

The order of dismissal of May 1, 1952, was a final order as to Howard Clemons. The first motion to vacate the judgment was filed in the office of the Clerk on May 29, 1952. The motion was not brought to the attention of the court until June 6, 1952, more than 30 days after the entry of the order of dismissal. Section 21 of the Municipal Court of Chicago Act (Par. 376, Ch. 37, Ill. Rev. Stat. 1951) provides that every judgment, order or decree final in its nature shall be subject to be vacated, set aside or modified in the same manner and to the same extent as a judgment, order or decree of the Circuit Court during the term at which the same was rendered in such Circuit Court; provided, a motion to vacate, set aside or modify the same be entered in the Municipal Court within 30 days after the entry of such judgment, order or decree. That section further provides that if no motion to vacate, set aside or modify any such judgment, order or decree shall be entered within 30 days after the entry of such judgment, order or decree, the same shall not be vacated, set aside or modified excepting upon appeal or by suit in equity, or by petition to the Municipal Court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a suit in equity; provided, that the errors in fact in the proceedings in such case which might have been



corrected at common law by the writ of error coram nobis may be corrected by motion, or the judgment may be set aside in the manner provided by law in similar cases in the Circuit Court.

A motion is an application made to the court and the mere filing of it in the office of the Clerk is not such an application. It must be brought to the attention of the court and the court asked to rule on it. City of Marengo v. Eichler, 245 Ill. 47; Velde v. Schrock, 253 Ill. App. 274; People v. Hornaday, 400 Ill. 361. From these authorities it follows that the motion filed by plaintiff in the Clerk's office on May 29, 1952, and not brought to the attention of the court until June 6, 1952, was not entered within the 30 days contemplated by Sec. 21 of the Act.

We turn to the petition in support of the motion in order to determine whether it comes within the provision that if no motion to vacate, set aside or modify a final order shall be entered within 30 days after the entry thereof the same shall not be vacated, set aside or modified, except by a petition setting forth grounds for vacating, setting aside or modifying the same which would be sufficient to cause the same to be vacated, set aside or modified by a suit in equity, or within the requirements of the proviso that errors in fact in proceedings in such case which might have been corrected at common law by the writ of error coram nobis may be corrected by motion, or the judgment may be set aside in the manner provided by law in similar cases in the Circuit Court. The petition brought to the attention of the



court more than 30 days after the order of dismissal, states that prior to May 1, 1952, a law partner was in charge of the cause; that when the cause was called for trial on that day the partner was "outside of the State of Illinois." The petition does not make any showing that would authorize the court to set aside the order of dismissal. Therefore the order of the Municipal Court of Chicago of June 26, 1952, vacating the order of May 1, 1952, and reinstating the cause as to Howard Clemons is reversed, and the order of May 1, 1952, is restored.

ORDER OF JUNE 26, 1952 REVERSED  
AND ORDER OF MAY 1, 1952, RESTORED.

NIEMEYER, P.J. AND FRIEND, J. CONCUR.





269 A

46065

ROBERT HARVELL and HATTIE HARVELL,  
Appellants,

v.

MILTON H. SOLOMON and BETTE SOLOMON,  
his wife, AL DENBERG and ALBERT J.  
HORAN, Bailiff of the Municipal Court  
of Chicago,

Appellees.

351 I.A. 512<sup>1</sup>

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Robert Harvell and Hattie Harvell, his wife, filed an amended complaint in the Circuit Court of Cook County alleging that they are the owners of the improved real estate at 4240 Langley Avenue, Chicago; that in order to repair fire damage to that property they negotiated a usurious loan from Al Denberg, a defendant; and that as security for the loan they conveyed the premises to Denberg by warranty deed and received in return an installment contract. They said that they understood the deed and contract to be a mortgage. Denberg subsequently sold the property to Milton H. Solomon and Bette Solomon, also named as defendants. Plaintiffs defaulted in their payments under the contract and the Solomons served them with a notice of termination. Plaintiffs prayed that their conveyance be decreed a mortgage; that the contract be declared usurious; for a reconveyance, and an accounting.

Milton H. Solomon filed a motion to dismiss the cause as to him, pursuant to Section 48G of the Civil Practice Act. His supporting affidavit alleged that the



facts giving rise to plaintiffs' cause of action occurred prior to May 3, 1949, at which time the Solomons filed a forcible detainer suit in the Municipal Court of Chicago; that plaintiffs thereupon filed a complaint in chancery in the Circuit Court seeking substantially the same relief as here, and praying for a temporary restraining order. The parties then negotiated a settlement agreement whereby plaintiffs promised to pay \$3100 in the form of \$2725 in cash and \$375 in installments secured by a junior mortgage. The Solomons insisted that before they would agree, a judgment for possession in their favor would have to be entered in the Municipal Court proceeding and a general release given by plaintiffs to them. Plaintiffs so agreed and pursuant thereto on June 6, 1939, a judgment for possession was entered in the Municipal Court against plaintiffs and a writ of restitution stayed 30 days to enable plaintiffs to raise the funds. Plaintiffs gave a written release, the first Circuit Court case was dismissed and the Municipal Court judgment for possession was entered. Then an agreement was entered into placing a deed to the premises from the Solomons to plaintiffs in escrow. This deed was to enable plaintiffs to secure a loan upon the premises. A deed of reconveyance was also placed in escrow. Objections to the title not having been cleared by plaintiffs within the time limited in the escrow agreement, the Solomons exercised their rights under the terms thereof and obtained a reconveyance. Milton H. Solomon then argued that plaintiffs ought not



to have their cause of action because by their deed they parted with all right, title and interest in and to the premises, and because with full knowledge of their rights they executed a release and waived the causes of action stated in their amended complaint. The motion of Milton H. Solomon was sustained and on January 28, 1950, he was dismissed as a defendant. No appeal was taken from that order.

On January 27, 1950, Bette Solomon filed a motion, supported by an affidavit similar to the motion and affidavit filed by her husband, to dismiss the amended complaint. Al Denberg also filed a motion to dismiss. The motions were denied and Al Denberg and Bette Solomon were ordered to answer. Subsequently, the denial of the motions to dismiss was vacated and both motions to dismiss were allowed. Plaintiffs appealed to the Supreme Court. That court, holding that a freehold is not directly involved, transferred the cause. See Harvell v. Solomon, 413 Ill. 577.

Plaintiffs assert that the motions to dismiss should have been denied because the complaint states a cause of action. The chancellor was not called upon to decide whether the amended complaint stated a cause of action. Plaintiffs say that their objections to the filing of the motions to dismiss the amended complaint should have been sustained. Defendants' motions were denied. On reconsideration the court allowed the motions and dismissed the amended complaint. The reconsideration of the matter





was within the discretion of the court. The proposition we are called upon to decide is whether defendants' motions, supported by affidavits, and the reply of plaintiffs, presented a defense that the demand set out in the amended complaint had been released.

The chancellor decided as a proposition of law from the admitted facts that the cause of action stated in the amended complaint had been compromised and released. Compromises of law suits are encouraged because they promote peace, and when there is no fraud and the parties meet on equal terms and adjust their differences, the court will recognize the compromises. Bingham v. Browning, 197 Ill. 122. There is no question that there was a bona fide dispute between the parties. After the contract to purchase the premises had been terminated the defendants sued for possession in forcible detainer. The plaintiffs thereupon filed a complaint in chancery in the Circuit Court to restrain the prosecution of that suit and for other relief. Plaintiffs were not successful in procuring the issuance of an injunction. They were then faced with the necessity of defending the forcible detainer proceeding and in prosecuting the chancery suit. The defendants were also faced with lengthy litigation. The attorneys for the parties conferred in order to end the litigation. An agreement was entered into under which plaintiffs executed a release and compromised their cause of action. Plaintiffs had a right to compromise



the litigation. The case of Ryan v. Newcomb, 125 Ill. 91, indicates that in cases where usury is charged that a settlement fairly made between the parties is binding. The question before the chancellor was not whether the original loan by Denberg to the plaintiffs was usurious, but whether, with full knowledge of their rights, the plaintiffs settled the pending litigation.

The facts are undisputed. Mr. Solomon informed plaintiffs' attorney that he would not be willing to continue the forcible detainer case while plaintiffs attempted to procure a loan on the premises because plaintiffs were collecting the rentals, and if the matter dragged, plaintiffs would be enriched and he, Solomon, would be relegated to his previous condition. Mr. Solomon stated that as a condition precedent to accepting the offer he would require a judgment for possession and a release of all claims. This proposal was accepted, the judgment was entered by agreement, the Circuit Court proceedings dismissed and a release was delivered to him. The release was a condition precedent to his entering into the escrow agreement in which he conveyed the property to the plaintiffs. Mr. Solomon performed his duties under the preliminary agreement and the rights of the parties were thereafter controlled by the escrow. The entering into <sup>the</sup> escrow constituted fulfillment of the settlement and warranted dismissal of the first chancery suit. The escrow agreement discloses a complete transaction under which the Solomons were selling and the



plaintiffs were buying the premises. That agreement provides for the deposit of a deed by the Solomons and for the payment of a certain amount of money to them. It further provides that if the title company was unable to issue a policy within a given time, and if the plaintiffs wished to withdraw their money, that they must deposit a deed of reconveyance. Because of the failure of plaintiffs to clear objections shown on the opinion of title, the reconveyance was made. The reconveyance was in accordance with the escrow agreement and was not caused by any fault on the part of the Solomons. Nowhere in the escrow agreement is there any reference to a release being deposited. It would have been a simple matter, had that been the agreement, to have provided in the escrow agreement for the deposit of the release and the return of the same in the event that the deal fell through. The record shows clearly that the release was not part of the escrow agreement but was a condition precedent to the same.

The plaintiffs contend that they are not bound by the escrow agreement because it "was mutually rescinded." The escrow agreement was not rescinded. Under that agreement a deed was to be put up by the defendants, a certain amount of money was to be made available through a money-lender's agreement, and when the money was up the deed was to be recorded. This took place. It is not disputed that the defendants conveyed good title. Under the terms of the escrow agreement, if the escrowee was not



prepared to pay out the cash at the end of 30 days, then, in order to receive back their money, the plaintiffs had to deposit a deed of reconveyance. This the plaintiffs did. From the statement of facts it is obvious that the Solomons did not rescind the escrow. To the contrary the Solomons demanded compliance with the terms of the escrow. The cases cited by plaintiffs on the subject of mutual rescission do not have any application to the facts of the case at bar. The escrow agreement was entered into with both sides represented by counsel, after suit had been filed setting forth all of the claims of the plaintiffs. There is no contention that any fraudulent representations were made in bringing about the compromise.

Therefore the order of the Circuit Court of Cook County is affirmed.

ORDER AFFIRMED.

NIEMEYER, P. J., and FRIEND, J., Concur.



1870

The first of these is the fact that the  
population of the United States has  
increased from 3,900,000 in 1790 to  
62,000,000 in 1900. This increase  
has been due to a number of causes,  
but the most important is the  
immigration of foreign-born  
people. The number of foreign-born  
people in the United States in 1900  
was 12,000,000, or about one-fifth  
of the total population. This  
immigration has been the result of  
a number of factors, including the  
desire for better living conditions,  
the search for economic opportunity,  
and the desire to escape political  
persecution. The immigration has  
been particularly heavy from  
Europe, and has been especially  
heavy from Germany, Ireland, and  
Italy. The immigration has had a  
great influence on the development  
of the United States, and has been  
one of the most important factors in  
the growth of the country.

THE UNITED STATES

1870

270

A

46029

ALFRED PETERSEN,  
Appellee,  
v.  
DONALD ARCHIBALD,  
Appellant.

APPEAL FROM MUNICIPAL  
COURT OF EVANSTON

351 I.A. 512<sup>2</sup>

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover damages occasioned by the alleged negligence of defendant in an automobile accident. The jury returned a verdict for plaintiff in the sum of \$10,000.00, upon which the court entered the judgment from which this appeal is taken.

The accident occurred on October 6, 1949, shortly before 8:00 a.m., at the intersection of Sherman avenue and Noyes street, in Evanston, Illinois. Plaintiff was driving his automobile, a 1946 Plymouth, in a westerly direction on Noyes street, approaching the intersection with Sherman avenue. There were stop signs on Noyes street for east and westbound traffic, but none on Sherman avenue for north and southbound traffic. Defendant's car, a 1949 Mercury, was being driven by him in a southerly direction on Sherman avenue, approaching the intersection of Noyes street. Petersen, an employee of the Gateway Engineering Company, was on his way to do an iron work job at the Wieboldt Store in Evanston, located at Ridge and Oak streets. Archibald was on his way to breakfast at a drug store at Clark and Sherman streets, en route to a nine o'clock class at school. It was not



raining at the time of the accident, but the streets were wet and the pavement slippery. There is some conflict in the evidence as to whether or not there were cars parked on Sherman avenue. Starting from a complete stop, Petersen entered the intersection after allowing a car to go north on Sherman avenue and then saw defendant's car coming, at approximately thirty miles per hour, from a northerly direction. Petersen continued to enter the intersection slowly, working his clutch up and down. Archibald, driving south on Sherman avenue, saw plaintiff's automobile as it was entering the intersection. He stated that his view was partially obstructed by cars northbound on Sherman avenue. Immediately preceding the collision, Archibald's vehicle swerved to the right to avoid collision. Petersen's car did not swerve but continued straight in a westerly direction. The impact occurred in the northwest quarter of the intersection, with the front left part of Archibald's car striking the front right of Petersen's, turning it so that it faced south in the northbound lane of Sherman avenue. Defendant's car stopped in front of eastbound traffic on Noyes street.

As the principal ground for reversal it is urged that plaintiff was guilty of negligence, as a matter of law, for failure to exercise due care for his own safety as he entered a designated through street, and that the court should therefore have directed a verdict for defendant at the close of all the evidence or entered judgment notwithstanding the verdict.



At the time of the accident plaintiff was sixty-six years old and had driven a car for about thirty-five years. He testified that as he proceeded west on Noyes street he came to a dead stop before entering the intersection of Sherman avenue; that he looked to his right and saw a car going south about a block away; that he looked to his left and saw a car about a half block away which passed the intersection while he was standing there; that he again looked to his right, saw plaintiff's car about half a block away, then looked to his left to see if any car was coming from the south and, seeing none, entered the intersection; that as he reached the center of the intersection he again looked to his right and observed defendant's car "right close to me. I was about fifty feet away from him. \*\*\* and he swung me so hard, my car was facing south"; that he was thrown completely away from the left side of the car where he had sat at the wheel, to the door on the right, breaking the arm rest on the right door, striking his head and twisting his back and side. Following the impact he got out of the car and went over to talk to defendant, who said, according to plaintiff's version, "'Pop, I couldn't help it, I was going too fast; the roads were too slippery, I couldn't stop.'"

Defendant was driving a 1949 Mercury in a southerly direction on Sherman avenue at a speed of about twenty-five miles an hour. He testified that there were cars parked intermittently on both sides of Sherman avenue;





that when he first saw plaintiff's automobile it was entering the intersection; that there was northbound traffic, as well as some parked cars, that obstructed the view from plaintiff's car; that the front left of his car hit the right front of plaintiff's automobile; that the entire left-hand side of his car, the lights, fender, hood, bumper, grilles and "my whole left front was struck and dented." Defendant further testified that within about twenty yards of the intersection he applied his brakes and swerved to the right. He stated that he was about sixty feet away when he first saw plaintiff; previously he had told a police officer he was twenty feet from the intersection at the time.

The testimony of Peter Forest, an eyewitness to the accident, who was driving east on Noyes street, throws little light on the occurrence. We have examined the record carefully, and although there is some conflict in the evidence of the two principal witnesses, we find no support for defendant's contention that plaintiff was guilty of negligence as a matter of law and that his negligence was the proximate cause of the accident. The jury had a right to believe that defendant, by exercising ordinary care, had an equal opportunity to discover plaintiff and to avoid colliding with him. The question of lookout was obviously a problem for the jury, to be determined by the credibility of the witnesses.

The remaining question relates to the amount of the damages awarded. Defendant contends that the verdict

The first thing I noticed when I stepped out of the car was the cold. It was a sharp, biting cold that seemed to penetrate to the bone. I shivered as I walked towards the building, my hands tucked into my pockets. The air was thick with a heavy mist, and the ground was slick with rain. I had heard that the weather was bad, but I didn't realize it would be this bad. The building I was heading to was a large, imposing structure with many windows. Some of the windows were lit up, while others were dark. I walked up the steps and entered the building. The interior was warm and smelled of old wood. A man in a suit and tie was waiting for me. He introduced himself as Mr. Smith and said that he was the manager of the building. He showed me to my room, which was on the top floor. The room was small but comfortable. I took a shower and got dressed. I then went to the dining hall, where I met several other people. They were all looking a bit nervous. I asked them what was wrong, and they told me that they had heard some strange noises the night before. I didn't think much of it at the time, but now I was starting to feel a bit uneasy. I went back to my room and tried to go to sleep, but I couldn't. I kept hearing noises, like footsteps and whispers. I finally gave up and went back to the dining hall. The manager, Mr. Smith, was there. He told me that he had also heard some noises the night before. He said that he was going to investigate. I decided to go with him. We went to the basement, which was dark and creepy. Mr. Smith had a flashlight, and we used it to look around. We found some old boxes and some papers. One of the papers had a picture of a man on it. The man looked familiar to me. I didn't know where I had seen him before, but I felt like I should. Mr. Smith and I went back to the dining hall. He told me that he was going to call the police. I decided to stay in the building. I was curious to see what would happen. The night was long and scary. I didn't sleep a wink. In the morning, the police came. They searched the building and found nothing. They told me that I was free to go. I didn't want to leave. I stayed in the building for a few more days. The noises stopped, but I still felt uneasy. I decided to leave. I took a taxi home. I was tired and scared. I didn't know what had happened, but I knew that I had been through something. I was going to tell my friends about it. They would probably think I was crazy, but I didn't care. I was going to tell them the truth. I was going to tell them that I had been in a building where something strange had happened. I was going to tell them that I had seen a man who looked familiar to me. I was going to tell them that I had heard some strange noises. I was going to tell them that I had been scared. I was going to tell them that I had been through something. I was going to tell them that I was going to tell them the truth.

was unreasonable and excessive. Upon this phase of the question it appears that before the accident plaintiff was in good health and employed as an iron worker, an occupation which required heavy lifting. Upon his arrival at home after the accident he realized that he must have sustained a back injury and that he was suffering from diarrhea. At the time of the trial he was still experiencing diarrhea and was also extremely nervous. He constantly suffered from backache and felt sharp pain in the area where his back was injured, had difficulty in getting up from a sitting position, and has been able to do only light work since the accident. The physician whom he first consulted prescribed a corset which plaintiff wore up to the time of the trial, a period of almost three years.

Two medical witnesses testified in his behalf. Dr. N.S. Zeitlin, a roentgenologist, interpreted several x-rays produced at the trial. He stated that these films showed flattening of the disks, and that the fourth, fifth and sixth vertebral bodies were "suffering" as the result of being crowded together. He also found a healed fractured vertebra which, in his opinion, could have been caused by trauma, and he added that a fracture of that type usually causes pain immediately after the accident. It was Dr. Zeitlin's opinion that the fractured vertebra could have been caused by a twist of the body with the muscles pulled violently by the bone.



Dr. L.W. Shabat, who examined plaintiff before the trial and who saw him on four occasions, testified that there was a marked restriction of the forward bending of the spine in the lumbar region, and that the muscles in that area were spastic and stiff. In answer to a hypothetical question he stated that there might or could be a causal connection between the accident and plaintiff's physical condition at the time of the examination; that plaintiff undoubtedly had an aggravation of pre-existing arthritis, and that colitis could be the result of a trauma. Dr. Shabat further testified that the disk pathology appearing in the x-rays could have been caused by the accident, and that an aggravation of the disk condition is the only explanation of such pathology. He further testified that the fracture of the transverse process could have been caused by the accident; that the conditions he found were permanent; that plaintiff could not attempt to do heavy work; and that he would continue to require diathermy and massage with heat-lamps treatments, as well as attention for his irritated colon.

There is no complaint as to any of the instructions. The jury were advised as to the elements which they might take into consideration in assessing the amount of damages to which plaintiff was entitled. In the light of his continued pain, some loss of work and wages, medical expenses, the permanency of the injuries to which the



physicians testified--the fractured transverse process, the sciatic nerve involvement, the disk pathology and the irritated colon--with plaintiff's resultant limited ability to work, we think the verdict of \$10,000.00 was not excessive. The case was fairly tried, and the propositions of liability and damages were, as we have stated, primarily questions of fact for the jury to decide. Accordingly, the judgment of the Municipal Court of Evanston is affirmed.

JUDGMENT AFFIRMED.

NIEMEYER, P.J., and BURKE, J., Concur.





46138

ADMIRAL TRAILER MFG. CO., a corporation,

Appellee,

v.

ALL STATES TRAILER COMPANY, a corporation, and

GEORGE J. BLOSTEN,  
Appellants.

INTERLOCUTORY APPEAL

CIRCUIT COURT

COOK COUNTY

351 I.A. 513

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Defendants appeal from an order of the Circuit Court entered May 12, 1953 denying their motion to dissolve a temporary injunction and vacate an order appointing a receiver pendente lite granted on ex parte application April 30, 1953, without notice and without bond. Pending the appeal, we granted defendants' motion to stay the force and effect of the interlocutory order, upon the filing of a bond in the amount of \$5000.00, conditioned to pay any costs awarded.

The verified complaint, upon which these orders were entered, alleged that on December 23, 1952 plaintiff entered into an agreement with the corporate defendant, of which George J. Blosten is a principal officer and stockholder, for the manufacture of house trailers. Attached to the complaint is a written document entered into between the parties, which plaintiff construes as an agreement creating a joint enterprise wherein plaintiff was to share profits on the basis of fifty dollars for each trailer manufactured. It is further alleged that by virtue of the agreement a fiduciary relation was created



between the parties, and that Blosten caused the corporate defendant to breach the agreement in the following respects: it has refused to employ salesmen; it has refused to permit the manufacture of more than two trailers a week, although the capacity of the plant is not less than ten trailers; it has threatened officers of the plaintiff that unless they agreed to abandon the enterprise it would refuse to permit the manufacture of more than one trailer a month, although it had been offered a favorable contract by third parties; it has attempted to coerce plaintiff's agents into breaking the agreement; it has shipped property belonging to the joint enterprise out of this jurisdiction to defeat plaintiff's rightful claims; it has threatened to dispose of the remaining assets of the enterprise, including sixteen fabricated house trailers at addresses other than on the leased premises; and it has carried on negotiations with third parties, without consultation with the officers of plaintiff, for the purpose of obtaining secret profits. Plaintiff asserts that as a result of these actions on the part of Blosten and the corporate defendant, plaintiff has suffered damages to the extent of \$40,000.00, and it states that a continuation of such practices will cause it to lose its interest in the alleged joint enterprise. No allegation is made as to the insolvency of either or both of the defendants. The relief sought is for an accounting,



damages and dissolution of the joint adventure.

The document attached to the complaint has the attributes of a lease rather than an agreement for a joint adventure. Among the covenants contained therein, the corporate defendant agrees to pay "rent for said sublet premises and the renting of the machinery and fixtures, payable at the rate of fifty dollars (\$50.00) per each house trailer produced at the above address and payable in monthly installments . . ." It provides that the corporate defendant is to keep the premises in repair, not to hold plaintiff liable for damages resulting from failure to repair or to use the premises in such manner as will increase the rate of insurance, nor to sublet without permission. An eleven-paragraph rider attached to the principal document sets out additional terms of the agreement relating specifically to the underlying lease, including an option to "lessee" to purchase the machinery and the fixtures on the premises at the end of the leasing period for \$500.00, and a provision for the delivery to lessee of the inventory on hand as an inducement to enter into the lease. In the rider the parties are referred to as lessor and lessee.

The complaint and the relief sought are based on the theory of a joint adventure. We have carefully examined the written agreement and are satisfied that the only relationship existing between plaintiff and the corporate defendant is that of landlord and tenant. It shows on its





face that plaintiff has no **proprietary** interest in any assets of defendant or in any joint adventure; its remedy, if any, is at law for all wrongs asserted.

The granting of the temporary injunction precluded defendant from disposing of its own property, and the effect thereof was to hold defendants' assets for levy pending the possibility of a money judgment. This procedure was held to be an improper use of an injunction as early as 1857 in Phelps v. Foster, 18 Ill. 309, and in Dunham v. Kauffman, 385 Ill. 79, the court held that there can be no such thing as an equitable attachment.

Moreover, it has repeatedly been held that a temporary injunction, being a drastic remedy, should be granted only under extraordinary circumstances, and that the statutory requirement of notice and bond should be waived only when a clear case is shown on the face of the complaint indicating the need for this waiver. The propriety of granting a temporary injunction without notice and without bond was squarely raised in Lee v. Morris (Abst.), 326 Ill. App. 555, where the court made the following pertinent observation: "The fact that the order granting the injunction makes a finding that the writ shall 'for good cause shown, issue without bond,' avails nothing unless cause is shown by the record. Wagner v. Okner, [306 Ill. App. 601]. The issuance of an injunction without giving a bond rests largely in the discretion of the court; nevertheless, a sufficient showing must be made

The following table shows the results of the experiments conducted on the effect of the temperature of the water on the rate of the reaction between the acid and the alkali. The results are given in the form of a table, the first column of which gives the temperature of the water in degrees Fahrenheit, the second column gives the time in minutes and seconds, and the third column gives the volume of gas evolved in cubic centimeters.

| Temperature of water (°F) | Time (min. sec.) | Volume of gas (cc.) |
|---------------------------|------------------|---------------------|
| 50                        | 1.30             | 10.0                |
| 55                        | 1.15             | 11.0                |
| 60                        | 1.00             | 12.0                |
| 65                        | 0.45             | 13.0                |
| 70                        | 0.30             | 14.0                |
| 75                        | 0.20             | 15.0                |
| 80                        | 0.15             | 16.0                |
| 85                        | 0.10             | 17.0                |
| 90                        | 0.05             | 18.0                |

The results of these experiments show that the rate of the reaction increases with the temperature of the water. This is to be expected, since the rate of a chemical reaction increases with the temperature. The volume of gas evolved also increases with the temperature, but this is due to the fact that the gas is more soluble in water at a lower temperature.

on which to base the discretion. Grossman v. Grossman, [304 Ill. App. 507]. . . . To justify excusing the bond on the ground that defendant was secured against loss through the issuance of the injunction, because the plaintiff had sufficient means to respond in damages (Weinstein v. Levin, [317 Ill. App. 383], 45 N.E. (2d) 891), the complaint or the affidavit supporting the same should contain facts showing the financial condition of the plaintiffs to the extent that a fair inference could be drawn that defendant would be just as well protected as though bond were given." The instant bond clearly shows on its face that these conditions did not prevail. The statute provides for a bond in order to protect defendant in the event of the dissolution of the injunction. In the instant case plaintiff states that "the aforesaid wilful acts by defendants have placed plaintiff in such a precarious financial position that today it does not have any funds." Rather than excuse a bond, this statement clearly indicates the need for one.

Nor does the complaint justify the issuance of an injunction and the appointment of a receiver without notice to defendants. No allegation of insolvency is made; plaintiff merely alleges that defendants are disposing of property which, according to the complaint, belonged to the corporate defendant; there is no allegation that defendants are disposing of any property or assets belonging



to plaintiff which are subject to the corporate defendant's leasehold.

There is ample authority for the rule that the purpose of a preliminary injunction is largely to preserve the rights of the parties in status quo until the cause can be disposed of on the merits. Almon v. American Carloading Corp., 380 Ill. 524; Cassidy v. Triebel, 337 Ill. App. 117. In the instant case the status quo was that of a corporate defendant in possession of its assets and under no prohibition with respect to the sale or disposition thereof. By the order of the court the corporate defendant's property was seized; it was deprived of possession and even of title, the receiver having been authorized to sell the products of the business. The injunction restrained the corporate defendant from continuing its business in the ordinary course. This certainly was not a preservation of the status quo.

In the light of these conclusions, we hold that the order for a temporary injunction and the order for a receiver were improvidently entered. Accordingly, the order denying the defendants' motion to dissolve the temporary injunction and vacate the order appointing a receiver should be reversed, and it is so ordered.

ORDER REVERSED.

NIEMEYER, P. J., and BURKE, J., Concur.



tract

APPELLATE COURT

THIRD DISTRICT

OCTOBER TERM, A.D. 1953

351 I.A. 514

General No. 9905

Agenda No. 9

Claimant-Appellant,

VS.

Estate of William F. Sternberg,

Defendant-Appellee.

Appeal from the  
Circuit Court of  
Ford County

Wheat, J.

Plaintiff-appellant, Sternberg Dredging Co., a Delaware Corporation in process of dissolution, filed in the County Court of Ford County its claim against the estate of William F. Sternberg, deceased, defendant-appellee, for payment of two promissory notes executed by "C. H. Sternberg Heirs, by W. F. Sternberg, Agent" and payable to plaintiff's order. The claim alleged that William F. Sternberg, also known as W. F. Sternberg, was, at the time of execution of the notes, one of the heirs of C. H. Sternberg and as such, jointly and severally liable for payment thereof or in the alternative, if he had no authority to execute the notes as agent, he was liable on his warranty of authority.



back

STATE OF ILLINOIS

IN SENATE

ATTEST

851 I.A. 514

COMMONS

1900

General

Special from the  
Illinois State of  
Ford County

Chairman-Appellant

Stenberg, Plaintiff  
Corporation

vs.

Estate of William F. Stenberg

Defendant-Appellee

First, J.

Plaintiff-appellant, Stenberg, Plaintiff, a defendant

Corporation is process of dissolution, filed in the County Court  
of Ford County, has filed a petition for the estate of William F. Stenberg,  
deceased, defendant-appellee, for payment of the money due

executed by W. F. Stenberg, late of W. F. Stenberg, Plaintiff,  
and payable to Plaintiff's estate. The claim against said William F.

Stenberg, also known as W. F. Stenberg, was, in the line of ex-  
ecution of the notes, one of the debts of W. F. Stenberg and as  
such, jointly and severally liable for payment thereof or in the  
alternative, if he had no authority to execute the notes as agent,  
he was liable on the warranty of authority.

From a judgment for \$17,750.41 entered by the County Court in plaintiff's favor, defendant appealed to the Circuit Court of Ford County where, upon a trial de novo, one of several affirmative defenses interposed by defendant was sustained and judgment entered in its favor from which judgment plaintiff appeals.

Voluminous pleadings consisting of the claim, defendant's affirmative defenses thereto and plaintiff's replies raised in substance the following issues: 1. Whether the action could be maintained at a time when plaintiff's certificate of authority to do business in Illinois had been revoked, plaintiff having theretofore instituted proceedings for voluntary dissolution in the state of its domicile. 2. Whether the transaction resulting in execution of the notes was ultra vires as to plaintiff, and in particular, whether plaintiff is a foreign corporation engaged in the business of loaning money. 3. Whether, in view of the allegation that Herman J. Sternberg owned all of the stock in the plaintiff corporation and of the admitted fact that he was one of the heirs of C. H. Sternberg, in whose name the notes were made, he was in effect both maker and payee of the notes, thereby discharging them. 4. Whether the monies advanced on the notes were in connection with a partnership transaction and the notes collectible only after a partnership accounting.

From a judgment for \$17,750.41 entered by the County Court in plaintiff's favor, defendant appealed to the Circuit Court of Ford County where, upon a trial de novo, one of several affirmative defenses interposed by defendant was sustained and judgment entered in its favor from which defendant plaintiff appeals.

Void issues leading to a consideration of the claim, defendant's affirmative defenses thereto and plaintiff's replies raised in substance the following issues: 1. Whether the action could be maintained at a time when plaintiff's certificate of authority to do business in Illinois had been revoked, plaintiff having there- before instituted proceedings for voluntary dissolution in the state of its domicile. 2. Whether the transaction resulting in execution of the notes was ultra vires as to plaintiff, and in particular, whether plaintiff is a foreign corporation created in the business of loaning money. 3. Whether, in view of the allegations that it was a corporation, plaintiff was at the time of the execution of the notes a corporation and of the admitted fact that it was one of the heirs of C. H. Stearns, if those names and notes were made, he was in effect both maker and payee of the notes, thereby dis- charging them. 4. Whether the monies advanced on the notes were in connection with a partnership transaction and the notes col- lectible only after a partnership accounting.

At the trial, documentary evidence only was introduced primarily relating in substance to plaintiff's corporate status and to the business relationship among the C. H. Sternberg heirs. At the conclusion thereof the Circuit Court rendered its written opinion directing that plaintiff's claim be dismissed because of its incapacity, under Ill. Rev. Stat. 1951, Ch. 32, Sec. 157.142, to maintain a suit in the court of this State resulting from its failure to pay certain franchise taxes and file certain annual reports. Thereafter, with leave of Court, plaintiff filed its motion to vacate the judgment and grant a new trial, reciting therein its intention to file such annual reports and pay such franchise taxes as might be due under Illinois law in order to obtain reinstatement of its certificate of authority to do business in Illinois, which motions were denied.

The chronological sequence of events relevant to the question whether plaintiff can maintain its suit is as follows:

June 15, 1926, plaintiff was incorporated in Delaware.  
October 14, 1941, plaintiff was authorized to do business in Illinois.  
January 12, 1943, and January 27, 1943, the notes sued upon were executed.  
October 21, 1949, plaintiff and its stockholders took action to dissolve.  
October 24, 1949, plaintiff filed a certificate of dissolution in the office of the Secretary of State of Delaware.  
July 5, 1950, plaintiff's claim on the notes in question was filed in the County Court of Ford County.  
November 15, 1950, plaintiff's certificate of authority to transact business in Illinois was revoked by the Illinois Secretary of State for failure to file its annual report and pay its franchise tax for the year 1950.



As the trial, necessary evidence only was introduced and  
 fairly relating in substance to Plaintiff's corporate status and  
 to the business relationship between the Plaintiff and Defendant. At  
 the conclusion thereof the Court is of the opinion that the Plaintiff's  
 claim is dismissed because of its  
 lack of merit. Under Ill. Rev. Stat. 1951, Ch. 55, Sec. 157.14, it  
 is the duty of the Plaintiff to file with the State Treasurer  
 certain franchise taxes and file certain annual reports.  
 Thereafter, with leave of Court, Plaintiff filed its motion to  
 set aside judgment and grant a new trial, stating therein its in-  
 tent to file such annual reports and such franchise taxes  
 as might be required under Illinois law in order to obtain reinstatement  
 of its certificate of authority to do business in Illinois, which  
 motion was denied.

The chronological sequence of events relevant to the ques-

tion whether Plaintiff can maintain the suit is as follows:

June 12, 1950, Plaintiff was incorporated in Delaware.  
 October 12, 1951, Plaintiff was authorized to do busi-  
 ness in Illinois.  
 January 12, 1952, and January 17, 1953, the notes and  
 checks were received.  
 October 21, 1953, Plaintiff and its stockholders took  
 action to dissolve.  
 October 22, 1953, Plaintiff filed a certificate of  
 dissolution in the office of the Secretary of State  
 of Delaware.  
 July 5, 1950, Plaintiff's claim on the notes in ques-  
 tion was filed in the County Court of Cook County.  
 November 12, 1950, Plaintiff's certificate of author-  
 ization to do business in Illinois was revoked by  
 the Illinois Secretary of State for failure to file  
 its annual report and pay its franchise tax for the  
 year 1951.

February 25, 1952, plaintiff's claim was allowed by order of County Court.  
March 13, 1952, bond on appeal to Circuit Court of Ford County was approved.  
December 19, 1952, judgment was entered as of December 2, 1952, dismissing plaintiff's claim.

Plaintiff urges that Section 142 of the Illinois Business Corporation Act (Ill. Rev. Stat. 1951, Ch. 32, Sec. 157.142) which inhibits a foreign corporation "required to pay a franchise tax... under this Act" from maintaining an action or suit is wholly inapplicable in this case and that the Circuit Court erred in holding to the contrary. To sustain this position plaintiff contends that the effect of the filing of the above noted certificate of dissolution in the office of the Delaware Secretary of State is governed by the law of plaintiff's domicile, the pertinent provision thereof, as pleaded in plaintiff's reply, being as follows:

"All (dissolved) corporations...shall...be continued for the term of three years from...dissolution...for the purpose of prosecuting and defending suits by or against them and of enabling them gradually to settle and close their business...but not for the purpose of continuing the business for which said corporation shall have been established..." (Delaware Laws, 1941, Ch. 132, Sec. 11)

Plaintiff contends that by force of the foregoing Delaware statute its authority to transact business anywhere, Illinois included, except for winding up its affairs, terminated immediately upon filing of the certificate of dissolution and that its liability to pay the Illinois franchise tax, imposed by Section 138 of the Act (Ill. Rev. Stat. 1951, Ch. 32, Sec. 157.138), terminated simultaneously because such tax is imposed only on "each foreign corpor-

February 25, 1952, plaintiff's claim was allowed by  
order of County Court.  
March 13, 1952, bond on appeal to Circuit Court of  
Fort County was approved.  
December 19, 1952, judgment was entered in of December  
2, 1952, dismissing plaintiff's claim.

Plaintiff was then Section 145 of the Illinois Business  
Corporation Act (Ill. Rev. Stat. 1951, Ch. 35, Sec. 145, 146) which  
prohibits a foreign corporation "prepared to pay a franchise tax...  
after this act" from maintaining an action or suit wholly in-  
applicable in this case and that the Circuit Court erred in holding  
to the contrary. To sustain this position plaintiff contends that  
the effect of the filing of the above noted certificate of disso-  
lution in the office of the Delaware Secretary of State is govern-  
ed by the law of plaintiff's domicile, the pertinent provision  
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"All (dissolved) corporations... shall... be con-  
sidered for the term of three years from... dissolution  
... for the purpose of prosecuting and defending suits  
by or against them and of enabling them to legally  
settle and close their affairs... but not for the  
purpose of continuing the business for which said  
corporation shall have been established..." (Delaware  
Law, 1941, Ch. 132, Sec. 11)

Plaintiff contends that by force of the foregoing Delaware  
statute its authority to conduct business anywhere, Illinois in-  
cluded, except for winding up its affairs, terminated immediately  
upon filing of the certificate of dissolution and that its in-  
ability to pay the Illinois franchise tax, imposed by Section 137  
of the Act (Ill. Rev. Stat. 1951, Ch. 32, Sec. 137, 138), terminated simi-



ation authorized to transact business in this state...", thereby in turn relieving plaintiff of any incapacity to sue imposed by Section 142 of the Act (Ill.Rev.Stat.1951,Ch.32,Sec.157.142).

Plaintiff points out moreover, that while its authority to continue to transact business was terminated by the law of its domicile upon filing of the certificate of dissolution, the Delaware statute specifically affirms the power and authority of a Delaware corporation to prosecute suits for a term of three years after issuance of such certificate. As the action in the instant case was commenced within two years from date of filing of the certificate of dissolution, which is within the limitation period prescribed by Section 94 of the Illinois Corporation Act (Ill.Rev.Stat.1951,Ch.32,Sec.157.94), no issue has arisen on this appeal as to the timeliness of plaintiff's action.

Finally, it is urged that instituting and prosecuting court action does not constitute "transacting business" within the meaning of Section 142 of the Act (Ill.Rev.Stat.1951,Ch.32,Sec.157.142) so that plaintiff is not on that account required to pay the franchise tax imposed by Section 138 of the Act (Ill.Rev.Stat.1951,Chap.32,Sec.157.138) in order to maintain its action.

It appears well established by the decisions in this State that "transacting business" as used in the Corporation Act refers only to the transacting of the ordinary business in which the corporation is engaged and does not include acts not constituting any

action authorized to transact business in this state....", thereby  
 in turn rendering plaintiff an involuntary transferee of the property.  
 Section 142 of the Act (111. Rev. Stat. 1921, Ch. 32, Sec. 142.1A2).  
 Plaintiff contends that moreover, that while its authority  
 to continue to transact business was terminated by the law of its  
 domicile upon filing of the certificate of dissolution, the relevant  
 statute specifically affords the power and authority of a Delaware  
 corporation to prosecute suits for a term of three years after issue  
 date of such certificate. As the action in the instant case was  
 commenced within two years from date of filing of the certificate  
 of dissolution, which is within the limitation period prescribed by  
 Section 94 of the Illinois Corporation Act (111. Rev. Stat. 1921, Ch.  
 32, Sec. 142.1A4), no issue has arisen on this appeal as to the time-  
 limit of plaintiff's action.  
 Finally, it is urged that plaintiff and respondent court  
 action does not constitute "transacting business" within the mean-  
 ing of Section 142 of the Act (111. Rev. Stat. 1921, Ch. 32, Sec. 142.1A2)  
 so that plaintiff is not an insolvent debtor required to pay the trans-  
 action tax imposed by Section 137 of the Act (111. Rev. Stat. 1921, Chap.  
 32, Sec. 142.1B1) in order to maintain the action.  
 It appears well established by the decisions in this state  
 that "transacting business" as used in the Corporation Act refers  
 only to the transacting of the ordinary business in which the cor-  
 poration is engaged and does not include acts not constituting any

of its ordinary business such as instituting and prosecuting actions in court. (Alpena Cement Co., v. Jenkins Co., 244 Ill.354. See also 1 Ill.Bus Corp.Act Annot.411). In the Alpena case plaintiff brought suit in an Illinois court to recover on a foreign judgment. The Supreme Court held that neither an isolated business transaction within this State nor the bringing of suit constituted transacting business in this State and that therefore plaintiff, a foreign corporation, was not required to comply with the statute then in force relating to the admission to this State of foreign corporations for the purpose of doing business in order to maintain its action. In this decision the Supreme Court distinguished United Lead Co. v. J.W. Reedy Elevator Mfg. Co., 222 Ill.199, where it was held that the plaintiff could not maintain action in the courts of this State because it had been transacting business here in violation of the statute relating to admission of foreign corporations.

Plaintiff also relies upon the decision of the Supreme Court in <sup>American</sup> Art Works v. <sup>Chicago</sup> Picture Frame Works, 264 Ill.610, wherein plaintiff brought suit in this State without first obtaining a license to do business here. The primary question in that case was whether plaintiff, in fact, was engaged in business in this State. In the course of its opinion the Court remarked as follows: "A foreign corporation which has not been transacting business in Illinois in violation of (the Act of 1905 relating to the right of foreign corporations to transact business in Illinois) is not required to comply with its

of the ordinary business of the company. The company also

[illegible]

There is no evidence that the defendant was involved in the operation of the business. The defendant was not involved in the operation of the business. The defendant was not involved in the operation of the business.

(The fact of 1933 relief in the field of foreign corporations to  
 protect business in Illinois) is not regarded as conflicting with the  
 which has not been transacting business in Illinois in violation of  
 of its opinion the court expressed as follows: "In forming corporation  
 bill, in 1933, was enacted in addition to this power, in the course  
 business laws. The primary question in that case was whether discrim-  
 promotion was to take place without first obtaining a license to do  
 in Atchafalaya v. Chicago, 301 U.S. 175, 58 S.Ct. 1011, 80 L.Ed. 1111.  
 American Chicago



provisions before it can sue in the state courts."

In the instant case the record fails to show what acts, if any, plaintiff has done in this State which constitute "transacting business" within the meaning of the Corporation Act and there is, therefore, necessarily no suggestion that it has been "transacting business" in violation of the Act. It accordingly appears that if the statement of the Supreme Court in the Art Works case, quoted above, is an accurate expression of the law under the existing Corporation Act, plaintiff is not barred from maintaining suit in the instant case and that this is so, irrespective of any supposed effect upon its authority to do business resulting from filing of the Delaware certificate of dissolution. For the same reason, it is clear that plaintiff is not barred, as defendant apparently contends, from maintaining its action by Section 125 of the present Act (Ill.Rev.Stat.1951,Ch.32,Sec.157.125) which provides:

"No foreign corporation transacting business in this State without a certificate of authority shall be permitted to maintain an action at law or in equity in any court of this State, until such corporation shall have obtained a certificate of authority."

It is to be noted, however, that Section 142 of the Act (Ill.Rev.Stat.1951,Ch.32,Sec.157.142), which similar to Section 125 (Ill.Rev.Stat.1951,Ch.32,Sec.157.125) in restricting the right of a corporation to maintain court action, imposes the restriction in circumstances differing in terms from those mentioned in Section 125 of the Act. Moreover, it does not appear that any

provisions before it can sue in the state courts. In the instant case the record fails to show what acts, if any, plaintiff has done in this state which constitute "transacting business" within the meaning of the Corporation Act and there is, therefore, necessarily no suggestion that it has done "transacting business" in violation of the Act. It accordingly appears that if the statement of the Supreme Court in the first case, quoted above, is an accurate expression of the law under the existing Corporation Act, plaintiff is not barred from maintaining suit in the instant case and that this is so, irrespective of any supposed effect upon its authority to do business resulting from lifting of the Delaware certificate of dissolution. For the same reason, it is clear that plaintiff is not barred, as defendant apparently contends, from maintaining its action by Section 125 of the present Act (III. Rev. Stat. 1951, Ch. 32, Sec. 125.125) which

provides:

"No foreign corporation transacting business in this state without a certificate of authority shall be permitted to maintain an action at law or in equity in any court of this State, until such corporation shall have obtained a certificate of authority."

It is to be noted, however, that Section 125 of the Act (III. Rev. Stat. 1951, Ch. 32, Sec. 125.125), which applies to Section 125 (III. Rev. Stat. 1951, Ch. 32, Sec. 125.125) in restriction the right of a corporation to maintain court action, imposes the restriction in circumstances differing in some from those mentioned in Section 125 of the Act. Moreover, it does not appear that any

statute similar to Section 142 of the present Act (Ill.Rev.Stat. 1951,Ch.32,Sec.157.142) was under consideration by the Court in the Art Works case. It may be assumed on the authority of the Alpena Cement case that a foreign corporation which has never done or qualified to do business in this State may sue in Illinois courts without first obtaining a certificate of authority to do business. It remains to be considered, however, to what extent this result is changed by adding the additional factor shown by this record, viz., that the plaintiff formerly was authorized to do business in this state.

Section 142 of the Illinois Business Corporation Act (Ill. Rev.Stat.1951,Ch.32,Sec.157.142), so far as relevant here, is in terms as follows:

"No corporation required to pay a franchise tax ...under this Act shall maintain any action at law ...until all such franchise taxes...have been paid in full."

It is Section 138 of the Act (Ill.Rev.Stat.1951,Ch.32, Sec.157.138) which prescribes what foreign corporations are required to pay a franchise tax:

"Each foreign corporation authorized to transact business in this State shall pay<sup>(d)</sup> an annual franchise tax during the month of July of each year in which the corporation is required...to file an annual report."

Section 115 of the Act (Ill.Rev.Stat.1951,Ch.32,Sec.157.115), in turn provides:

"Each foreign corporation authorized to transact business in this State shall file, within the time prescribed by this Act, an annual report..."



the record, viz., that the official formerly was authorized to

Section 1 of the Illinois Business Corporation Act (1983, Ch. 15, 1/1-1/1.1), as amended, is in effect.

THE NATIONAL BUREAU OF INVESTIGATION  
WASHINGTON, D. C. 20535  
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Section 1.13 (which prescribes what foreign corporations are re-

1. The corporation is required to file an income tax return for each year.

Section 115 of the Act (115 v. 1, 1911, Ch. 115, Sec. 115), in

...and in this case, the file, which the  
...also provided by this case, an appeal...

and Section 116 (Ill.Rev.Stat.1951,Ch.32,Sec.157.116) provides:

"Such annual report of a foreign corporation shall be delivered...between the 15th day of January and the last day of February of each year."

From the foregoing interrelated provisions of the Act it is clear that the restriction upon maintaining suit prescribed in Section 142 applies to foreign corporations "authorized to transact business in this state" which have not paid in full the franchise taxes due under the several provisions of the Act. (Ill. Rev.Stat.1951,Ch.32,Sec.157.138-140). It is apparent from the evidence that plaintiff did not pay any franchise tax for the year 1950 prior to entry of judgment by the Circuit Court and it is not denied that payment thereof was required by the Act if plaintiff was "authorized to transact business in this State".

Consequently, it is the meaning of this phrase which is ultimately at issue in determining the applicability of the restriction imposed by Section 142 of the Act and that meaning is to be determined from analysis of the relevant provisions of the Act.

A foreign corporation may become "authorized to transact business in this State" by "procuring a certificate of authority so to do from the Secretary of State" (Ill.Rev.Stat.1951,Ch.32, Sec.157.102) in accordance with the procedure detailed in Sections 106 and 107 of the Act. (Ill.Rev.Stat.1951,Ch.32,Sec.157.106 and 157.107). It appears from Sections 103 and 108 of the Act that

and Section 110 (111 Rev. Stat. 1951, Ch. 32, Sec. 157.107) provides:

"Such annual report of a foreign corporation shall be delivered...between the 15th day of January and the 1st day of February of each year."

From the foregoing summarized provisions of the Act it is clear that the restriction upon corporations with respect to Section 112 applies to foreign corporations as limited to their act business in this country which have not met the full and final criteria under the several provisions of the Act. (111 Rev. Stat. 1951, Ch. 32, Sec. 157.134-140). It is apparent from the evidence that applicant did not pay any franchise tax for the year 1950 prior to entry of judgment by the District Court and it is not denied that payment thereof was required by the Act if applicant was "authorized to conduct business in this State". Consequently, it is the opinion of this court that it is manifestly clear that the determination and applicability of the restriction imposed by Section 112 of the Act and that applicant is to be determined from evidence of the relevant provisions of the Act. It follows that applicant has been determined to be doing business in this country by reason of procuring a certificate of authority to do so from the Secretary of State. (111 Rev. Stat. 1951, Ch. 32, Sec. 157.102) in accordance with the procedure outlined in Sections 104 and 107 of the Act. (111 Rev. Stat. 1951, Ch. 32, Sec. 157.100 and 157.107). It appears from Sections 103 and 104 of the Act that

once such certificate of authority is issued the issuee remains authorized to transact business in this State "until a certificate of revocation or of withdrawal shall have been issued as provided in this Act". (Ill.Rev.Stat.1951,Ch.32,Sec.157.103 and 157.108). The certificate may be revoked by the Illinois Secretary of State on one of the several grounds stated in Section 122 of the Act (Ill.Rev.Stat.1951,Ch.32,Sec.157.122) or the corporation may, of its own motion, withdraw from the state in accordance with procedure detailed in Sections 120 and 121 of the Act. (Ill.Rev.Stat.1951, Ch.32,Sec.157.120 and 157.121). "Upon the issuance of such certificate of withdrawal (Ill.Rev.Stat.1951,Ch.32,Sec.157.121) (or) of revocation (Ill.Rev.Stat.1951,Ch.32,Sec.157.123) the authority of the corporation to transact business in this State shall cease."

In addition, it appears that the authority of a foreign corporation to transact business in this State may terminate without issuance of such certificate if the corporation is, by its charter, of limited duration. "Under the present Act a certificate of authority is considered as terminating at the time of the expiration of the existence of the corporation as set forth in its application for such certificate." (1 Ill.Bus.Corp.Act Annot.387). While it might be urged by analogy that the authority should likewise terminate upon expiration of the existence of the corporation resulting from its dissolution, there is a significant difference on which the analogy falls. If the corporation is of limited duration that



once they certificate of authority is issued the same remains  
 authorized to transact business in this state until a certificate  
 of revocation or of withdrawal shall have been issued as provided  
 in this act. (III. Rev. Stat. 1951, Ch. 32, Sec. 157.105 and 157.106).  
 The certificate may be revoked by the Illinois Secretary of State  
 on one of the several grounds stated in Section 157.107 of the act.  
 (III. Rev. Stat. 1951, Ch. 32, Sec. 157.107, on the other hand, of  
 its own action, without first obtaining a certificate with respect  
 and defined in Section 150 and 151 of the act. (III. Rev. Stat. 1951,  
 Ch. 32, Sec. 157.120 and 157.121. "Upon the issuance of such certificate  
 of withdrawal (III. Rev. Stat. 1951, Ch. 32, Sec. 157.121) any of  
 revocation (III. Rev. Stat. 1951, Ch. 32, Sec. 157.122) the authority of  
 the corporation to transact business in this state shall cease."  
 In addition, it appears that the authority of a foreign  
 corporation to transact business in this state may terminate either  
 on issuance of such certificate if the corporation is, at the  
 quarter, of limited duration. Under the present law a certificate  
 of authority is considered as terminating at the time of the expiration  
 of the existence of the corporation as set forth in its appli-  
 cation for such certificate. (I Ill. Rev. Stat. 1951, Ch. 32, Sec. 157.105)  
 it might be urged by analogy that the authority should likewise ter-  
 minate upon expiration of the existence of the corporation resulting  
 from its dissolution, there is a sufficient difference on which  
 the analogy fails. If the corporation is of limited duration that

fact is required to be shown in the application for certificate of authority (Ill.Rev.Stat.1951,Ch.32,Sec.157.106c). Consequently, at all times after issuance of the certificate of authority in such case it will appear of record that the certificate is limited and the Secretary of State may act accordingly in asserting liability for payment of taxes. If, as in the usual case, the corporate duration is not limited the certificate of authority apparently continues in force for an indefinite time. The only means of terminating the authority which the Act appears to recognize in such case are revocation or withdrawal through the procedures indicated above.

Based upon consideration of the foregoing interrelated sections of the Act, it is the opinion of this Court that a foreign corporation becomes "authorized to transact business in this State" within the meaning of Section 142 of the Act (Ill.Rev.Stat.1951, Ch.32,Sec.157.142) only upon the formal issuance of a certificate of authority and that, unless the corporation is of limited duration, its authority terminates or "ceases" only upon the formal issuance of a certificate of revocation or withdrawal.

None of these sections require or warrant inquiry into the question whether the corporation, is, in fact, doing business in this State except in so far as its failure so to do is one of the grounds for revocation of its certificate of authority. Neither, in the opinion of this Court, does the question whether a foreign

fact is required to be shown in the application for certificate of authority (Ill. Rev. Stat. 1917, Ch. 32, Sec. 1000). Consequently, at all times after issuance of the certificate of authority in such case it will appear of record that the certificate is limited and the Secretary of State may not accept it in extending liability for payment of taxes. If, in any such case, the Secretary of State is not limited the certificate of authority is not limited and remains in force for an indefinite time. The only means of terminating the authority which the Secretary of State is to recognize in such cases are revocation or withdrawal through the procedure indicated above. Based upon consideration of the foregoing interpreted provisions of the act, it is the opinion of this Court that a foreign corporation becomes "authorized to transact business in this State" within the meaning of Section 112 of the act (Ill. Rev. Stat. 1917, Ch. 32, Sec. 112.1A2) only upon the formal issuance of a certificate of authority and that, since the corporation is to be held up to the authority termination or "cessation" only upon the formal issuance of a certificate of revocation or withdrawal.

None of these sections relate to the question whether the corporation, in fact, transacts business in this State except in so far as its failure to do so is one of the grounds for revocation of its certificate of authority. Neither, in the opinion of this Court, does the question whether a foreign



corporation is authorized to transact business require or warrant inquiry into the question of its power, as distinguished from its authority, under the substantive laws of this State or that of its domicile to transact business generally.

The distinction between the concepts authority and power is inherent in the Act. Section 103 (Ill.Rev.Stat.1951,Ch.32,Sec. 157.103) "Powers of Foreign Corporation", provides that a foreign corporation

"shall...enjoy the same, but no greater, rights and privileges as a domestic corporation organized for the purposes set forth in (its) application (for certificate of authority to transact business in this State)."

It is clear, however, not only from the remaining language of Section 103 (Ill.Rev.Stat.1951,Ch.32,Sec.157.103), but also from the detailed provisions noted above relating to the issuance of a certificate of authority to transact business in this State that such of its powers as are necessary for it to "transact business" shall not be exercised unless a certificate of authority for that purpose has been issued by the Illinois Secretary of State.

The same distinction is manifest in Section 112 of the Act (Ill.Rev.Stat.1951,Ch.32,Sec.157.112) which directs that "each foreign corporation authorized to transact business in this State, whenever its articles of incorporation are amended, shall forthwith

corporation is authorized to transact business in any or all of the  
industry into the question of its power, as distinguished from its  
authority, under the substantive laws of this State in each of its  
domestic to transact business generally.

The distinction between the corporate authority and power is  
inherent in the act. Section 103 (111. Rev. Stat. 1921, Ch. 34, Sec.  
127.103) "Power of foreign corporation", provides that a foreign  
corporation

"shall... enjoy the same, but no greater, rights  
and privileges as a domestic corporation or a limited  
partner in the State (111. Rev. Stat. 1921, Ch. 34, Sec. 127.103)  
for the purpose of transacting business  
(for certificate of authority to transact business  
in this State."

It is clear, however, not only from the remaining language of  
Section 103 (111. Rev. Stat. 1921, Ch. 34, Sec. 127.103), but also from  
the detailed provisions noted above relating to the issuance of a  
certificate of authority to transact business in this State that  
such of the rights as are necessary for it to "transact business"  
shall not be exercised unless a certificate of authority for that  
purpose has been issued by the Illinois Secretary of State.

The same distinction is manifest in Section 112 of the act  
(111. Rev. Stat. 1921, Ch. 34, Sec. 127.112) which directs that "each  
foreign corporation authorized to transact business in this State,  
whenever its articles of incorporation are amended, shall forthwith

file in the office of the (Illinois) Secretary of State a copy of such amendment..." The same section recognizes that the powers of a foreign corporation may be enlarged by such amendment but directs that the required filing of a copy of such amendment "shall not of itself enlarge or alter the purpose or purposes which such corporation is authorized to pursue in the transaction of business in this State..." To the contrary, the exercise of such enlarged powers must first be authorized through the issuance of an amended certificate of authority in accordance with Section 114 of the Act. (Ill.Rev.Stat.1951,Ch.32,Sec.157.114).

Upon plaintiff's filing with the Delaware Secretary of State of the above noted certificate of dissolution, plaintiff, it may be conceded, immediately lost its power to carry on business transactions in the sense that such transactions although formally consummated by it thereafter might have been avoided in action by interested parties. It does not follow, however, that upon filing of that certificate it automatically lost its "authority to transact business in this State" within the meaning of Section 142 of the Act imposing the franchise tax (Ill.Rev.Stat.1951,Ch.32,Sec. 157.142). As a matter of record it remained "authorized to transact business in this state" as it had been since the issuance of its certificate of authority therefor so long as that certificate was not revoked or surrendered. The filing of the Delaware certificate of dissolution did not and could not revoke the Illinois

life in the office of the (Illinois) Secretary of State a copy of such statement... The same section recognizes that the power of a foreign corporation may be enlarged by such statement and directs that the required filing of a copy of such statement shall not of itself enlarge or limit the power or purposes which such corporation is authorized to exercise in the organization of business in this State... In the contrary, the exercise of such power of power must first be authorized through the issuance of an amended certificate of authority in accordance with Section 117 of the Act. (Ill. Rev. Stat., 1911, c. 32, sec. 117.11a).

Upon plaintiff's filing with the Secretary of State a copy of the above noted certificate of dissolution, plaintiff, as one of the above noted certificate of dissolution, is entitled to carry on business there- actions in the same way as such corporation. Although plaintiff was not a party to the dissolution, it is entitled to carry on business in accordance with the Act imposing the franchise tax (Ill. Rev. Stat., 1911, c. 32, sec. 127.1a2). As a matter of record it is entitled to carry on business in this state as it has been since the issuance of its certificate of authority, therefore so long as that certificate was not revoked or surrendered. The filing of the Delaware certificate of dissolution did not and could not revoke the Illinois



certificate of authority or expunge the record of it. The latter remained outstanding at least upon the records of the Illinois Secretary of State and so remained until revoked because of plaintiff's failure to pay its franchise tax and file its annual report. Plaintiff might have avoided this result by withdrawing from this State in accordance with the provisions of Section 120 of the Act ( Ill.Rev.Stat.1951,Ch.32,Sec.157.120) which would have entailed surrender of its certificate of authority to transact business here, and the filing of a final report and payment of such unpaid franchise taxes as might have then been due.

This it did not do and consequently, in the opinion of this Court, for the reasons indicated above, plaintiff remained "authorized to transact business in This State" within the meaning of Section 142 of the Act in spite of the filing of the Delaware certificate. Accordingly, it was required to pay an annual franchise tax in conformity with Section 138 of the Act until the issuance by the Illinois Secretary of State of A certificate of revocation of authority. Therefore, by the express terms of Section 142 it could not maintain this action until it had paid all such franchise taxes in full. To conclude otherwise would relieve plaintiff of liability for payment of franchise tax which, by implication at least, it concedes would be due if the Delaware certificate of dissolution had not been filed which, of course, was the result of plaintiff's voluntary action.

In support of its motion for a new trial and to set aside

certificate of authority or license is issued in it. The latter  
retained outstanding at least one of the following  
Secretary of State and a number of other persons of public  
life. It is not clear from the fact that the latter  
plaintiff is not a party to the suit. It is not clear  
whether in connection with the original of the latter of the  
( Ill. ex. Stat. 1921, Ch. 12, Sec. 12.1.10) which was  
surrendered of the certificate of authority to practice  
here, and the filing of a final report and payment of fees  
franchise taxes as required by law.

It is also not clear from the fact that the latter of the  
Court, for the reasons stated above, that the latter of the  
order to practice business in this state. It is not clear  
Section 12.1 of the act is not in force. It is not clear  
certificate. In fact, it is not clear that the latter of the  
six in connection with the latter of the latter of the  
the latter of the latter of the latter of the latter of the  
authority. Therefore, the latter of the latter of the latter  
not maintain this action until it is clear that the latter of the  
in fact. To conclude otherwise would be to hold that the latter  
ity for payment of franchise fees which, by implication at least, it  
conceded would be due if the balance certificate of dissolution had  
not been filed which, of course, was the result of plaintiff's vol-  
untary action.

In support of its motion for a new trial and to set aside

the judgment against it, plaintiff urged before the Circuit Court and has contended on this appeal that even though it is required by the Act to pay franchise taxes subsequent to the date of filing of the Delaware certificate of dissolution, its failure so to do bars its right to maintain suit only until such taxes have been paid and reports filed as the Act requires, and that consequently the Circuit Court erred in any event in entering final judgment against plaintiff instead of ordering that its action abate until such franchise taxes and reports as might be due were paid and filed. In its supplemental motion for new trial plaintiff further averred that it intended to and was making arrangements for payment of such taxes and filing of such reports. Pursuant thereto plaintiff states in its brief on this appeal that it has now filed such reports and paid such taxes, that its certificate of authority has been reinstated, and that it has formally withdrawn as a foreign corporation from this state. In connection therewith plaintiff has filed with the Clerk of This Court, together with other related documents, a certificate dated March 31, 1953, executed by the Illinois Secretary of State purporting to authorize plaintiff to do business in Illinois. Defendant has moved to strike these documents from the files of this Court, urging in substance that plaintiff's payment of back taxes and filing of reports resulting in reinstatement of its certificate of authority comes too late because of the fact that defendant by its pleadings specifically urged these matters in bar of maintenance



the defendant's motion to dismiss the complaint and  
has contended on this record that even though it is required by the  
Act to say that the motion is subject to the date of filing of the  
defendant's motion to dismiss, it is not required to do so in its  
right to maintain this motion until such time as the defendant has  
moved to dismiss the complaint, and that consequently the district  
court erred in any event in entering final judgment against the  
bill of exchange of defendant, that its action should be reversed. The  
Texas and various other bills of exchange were filed. In this  
appellate motion for new trial of defendant's motion to dismiss  
intended to and was taken up for consideration of each case  
and filing of new motion. Defendant's motion to dismiss is  
the first of this kind that it has ever filed with regard to  
bill of exchange, that the defendant's motion to dismiss is  
stated, and that it has been previously considered as a motion to dismiss  
from this state. The defendant's motion to dismiss is filed with  
the clerk of this court, together with other bills of exchange, a  
certification dated March 15, 1903, executed by the district court  
of Texas, in relation to the bills of exchange filed in this  
court, and moved to enter final judgment in favor of the  
bill of exchange, and in support of defendant's motion to dismiss  
and filing of the bill of exchange in relation to the certification  
of authority comes too late because of the fact that defendant by  
the pleading specifically urged other matters in lieu of maintenance

of plaintiff's action before the Circuit Court while plaintiff maintained that the revocation of its certificate of authority was immaterial. Defendant's motion has been taken with the case and in the opinion of this Court should be granted because the documents filed are irrelevant and immaterial to the issues upon this appeal.

As noted above, both Sections 125 and 142 of the Act ( Ill. Rev.Stat.1951,Ch.32,Sec.157.125 and 157.142) impose restrictions upon the right of a corporation to maintain suit in the courts of this State. In each Section it is evident that the restriction is intended not as an absolute bar of the action but primarily as in aid of collection of taxes and fees due this State under the Act. The authors of the Illinois Business Corporation Act Annotated, in commenting on Section 125, state that it was drafted on the theory that the procuring of a certificate of authority by a foreign corporation transacting business in this state should be the only condition precedent to its right to use the Illinois courts; that the acts of an unlicensed foreign corporation should not be void; and that the primary remedy of the State against a foreign corporation transacting business without a license should be by suit for fees, taxes and penalties. It seems evident that the same general theory underlies Section 142 which denies the use of Illinois courts to corporations generally which have not paid taxes, fees and penalties prescribed by the Act, irrespective of whether they are currently authorized to transact or are in fact transacting business in this



State. Accordingly it would appear that the only condition precedent to use of Illinois courts under Section 142 ( Ill.Rev.Stat. 1951,Ch.32,Sec.157.142) is the payment of fees, taxes and penalties imposed by the Act. This conclusion is obviously in accord with the language of the latter section which directs that suit shall not be maintained "until such (obligations) have been paid in full"(emphasis added) which at the same time, by the clearest implication, negatives any intention that the acts or contracts of a corporation which has not met such obligations should be considered void.

Sheffield Steel & Iron Co. v. <sup>Joe.</sup> Joseph & Bros.Co., 238 Ill. App.45, and Romano<sup>+Co.</sup> v. Baird & Warner, Inc., 262 Ill.App.165, are in apparent accord. In each of these cases the Court found the proof insufficient to show that the franchise taxes in question had not, in fact, been paid. Nevertheless, in the latter case, the Court stated that defendant's motion to deny plaintiff's right to maintain the action because of failure to pay franchise taxes was "in the nature of a plea in abatement". In the former case the Court remarked: "The suit could not be dismissed for failure to pay franchise taxes. It could only be continued until the taxes were paid." See also Emcee Corp. v. George, 293 Ill.App.<sup>2</sup>40 where, in construing Section 125 of the Act, the Court held that even if plaintiff was transacting business within this state without having obtained a certificate of authority, "the suit ought not to be dismissed because if (plaintiff) should thereafter obtain such certificate it could then proceed with the suit".





For the reasons indicated it is the opinion of this Court that even though plaintiff was not entitled to maintain its suit in the circumstances existing at the time of hearing before the Circuit Court, entry of final judgment against it was not authorized. The action should have been continued or abated, particularly in view of the representations in plaintiff's motion for a new trial that it was arranging to file such reports and pay such taxes as the Court found were required under the Act.

As the conclusion of its written opinion and after announcing its decision that plaintiff was not entitled to maintain suit, the Circuit Court stated that it expressed no opinion as to the other defenses claimed by the defendant. Nevertheless, the written opinion does review and comment briefly upon the other defenses and clearly indicates the Court's views with respect to them. In the opinion of this Court such expressions of the Circuit Court as to the other defenses are substantially correct and, therefore, need be but briefly reviewed here.

As to Issue Number 2 raised by defendant as noted above, the evidence does not sustain the contention that the notes were given in consideration for a loan and even if they were, there is no evidence showing that such loan would be ultra vires as to plaintiff (See Royal Drug Co., Inc., v. Levin, 273 Ill.<sup>App.</sup>231). Moreover, the defense of ultra vires is not available to defendant. (See

For the reasons indicated it is the opinion of this Court that every theory advanced by the defendant was not entitled to consideration in the circumstances existing at the time of the trial. The Court, aware of this, has not been confined in its action and has been confined in its action, but the theory in view of the representations in defendant's motion is a new trial and it was error to grant such relief and pay costs to the Court found were required under the act.

As the conclusion of the written opinion and other authorities in the Federal case-law is not entitled to be considered, the Circuit Court stated that it expressed no opinion as to the other defenses claimed by the defendant. Nevertheless, the written opinion does not state and cannot fairly upon the whole be taken as clearly indicating the Court's view with respect to them. In the opinion of this Court such expressions of the Court should be the other defenses are substantially correct and, therefore, need be but briefly reviewed here.

As to the defense raised by defendant as stated above, the evidence does not establish the conclusion that the defendant was given in consideration for a loan and even if such were, there is no evidence showing that such loan would be given as to claimant (New Royal Drug Co., Inc., v. Levin, 273 Ill. (231). Moreover, the defense of ultra vires is not available to defendant. (See



Section 8 of Illinois Business Corporation Act, Ill. Rev. Stat. 1951, Ch. 32, Sec. 157.8).

Issues numbered 3 and 4 hereinabove, raised by defendant, are interrelated and are ultimately based on the proposition that monies were advanced on the notes in connection with a partnership transaction, that the notes were made on behalf of the partnership, i.e., the C. H. Sternberg heirs, by their agent, and that they are payable to plaintiff as agent for Herman J. Sternberg, one of the partners. No authority whatever has been cited, however, in support of defendant's contention that the notes were "discharged" as Herman Sternberg was the real payee because of his alleged sole ownership of the plaintiff corporation. Nor are the notes "discharged" if they are regarded as partnership obligations, payable to one of the partners, as clearly appears from the decision in Funk v. Kempton, 123 Ill.App.100, relied upon by defendant. Moreover, under the evidence in the record before this Court there is no occasion to decide whether the notes may be collected only after a partnership accounting because there is no evidence that they were delivered in connection with a partnership transaction. The Circuit Court apparently regarded defendant's Exhibit 8, which is in terms an "agreement" and power of attorney from seven persons who are apparently heirs of C. H. Sternberg, to one of their number, as constituting a partnership agreement. However, the Court apparently concluded, and correctly so, that there is no evidence to show that

Section 1, Illinois State Water Conservation Act, Ill. Rev. Stat. 1921, Ch. 11, Sec. 127.5.

1. The first 100 years of the 20th century (1900-1999) are the period of the

concluded, and correctly so, that there is no evidence to show that  
petitioner's participation was voluntary. However, the Court apparently  
presently holds of *E. v. Terhune*, to one of its terms, as con-  
sidering "an agreement" and power of attorney from several persons who are ap-  
parently voluntarily participating in the transaction, which is in terms  
delivered in connection with a business transaction. The result  
is participation as voluntary because there is no evidence that they were  
no occasion to leave whether the case was as stated with other  
over, under the evidence in the record before the Court there is  
Bank v. Terhune, 133 Ill. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884,

the notes were given pursuant to the agreement. In fact, it is questionable whether, under the terms thereof, W. F. Sternberg was authorized to execute notes such as those in question. Under the evidence the presumption prevails that the "C. H. Sternberg heirs" are the obligors. (Ill.Rev.Stat.1951,Ch.93,Sections 39 and 40).

For the reasons indicated the judgment of the Circuit Court of Ford County is reversed and the cause remanded. The action should be continued or abated until such time as plaintiff presents in the Circuit Court evidence that it has paid in full all franchise taxes and penalties in connection therewith required to be paid under the Illinois Business Corporation Act.

Reversed and remanded with directions.

the notes were given, referred to the witnesses, and the  
questionable witness, under the cross-examination, was  
authorized to examine notes and other evidence, and the  
evidence was presented in a way that was not  
are the witnesses. The witnesses, however, are the  
for the reasons mentioned in the notes, and the  
of fact clearly is reversed and the other witnesses  
should be considered as correct and the other witnesses  
in the Circuit Court of the United States for the District  
tance and penalties in connection with the report to be made  
the Illinois State Bar Association.

reversed and remanded with directions.

3683 A

APPELLATE COURT  
STATE OF ILLINOIS  
FOURTH DISTRICT

October Term, A. D. 1953

Term No. 53-0-3.

Agenda No. 2

-----  
BERT HAWKINS, AMOS ELLIS, and JOE )  
WARREN, )  
Plaintiffs-Appellees, )  
 )  
-v- )  
 )  
DAN GUERDON, CARL LOGAN, DAVIS )  
MAYS, SYDNEY KEEN, J. P. )  
HOLMAN, ROBERT HOGAN, AMOS )  
LOGAN, FRANK JOHNSON, LENZY )  
MORRIS, J. S. BOLLING, SR., )  
MAGGIE GUERDON, IRENE McFAR- )  
LAND, REV. JOSEPH ROBINSON and )  
REV. J. H. KILLION, SR., )  
 )  
Defendants-Appellants. )  
 )  
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351 I.A. 515<sup>1</sup>

Appeal from  
Circuit  
Court of  
Madison County  
Illinois.

BARDENS, J.

The three plaintiffs in this case filed an application for injunction against some fourteen defendants, alleging that the plaintiffs were the duly constituted and acting officers of the Tabernacle Baptist Church of the City of Alton, Madison County, Illinois; that the defendants were former officers and members of said church; and that at regular business meetings of the church the defendants were disqualified and removed from their offices and that all defendants were expelled from membership. The complaint then avers that the defendants,





nevertheless, changed the lock of the church; prevented the regular officers and members from using the same; hold services in the church contrary to rules; contracted obligations without authority; and withhold funds from the church. Plaintiffs next allege that irreparable damage without adequate remedy at law would result unless temporary injunction be issued immediately without notice and without bond.

Upon the presentation of the complaint to the court, a temporary injunction was issued against the defendants, without notice, enjoining them from molesting or interfering with the business of the church or its members or trespassing against the real or personal property of the church or from contracting obligations in the name of the church or spending monies thereof. The injunction writ was dated February 10, 1953. On February 16, 1953, defendants entered their motion to dismiss the suit and dissolve the injunction. This was refused by the court and this appeal followed.

The only question for our decision is the propriety of the issuance of the temporary injunction without notice and without bond. We held in the case of Stenzel vs. Yates, 342 Ill. App. 435, 96 NE (2d) 813, that to justify the issuance of a temporary injunction without notice the complaint must aver facts which would make it appear that undue prejudice to the





plaintiffs would otherwise result. We further pointed out in that case that an averment that the plaintiffs would suffer irreparable injury and would be unduly prejudiced by giving notice was a mere conclusion unless it was supported by averment of facts showing the prejudice. To the same effect was our holding in *City of Edwardsville vs. Illinois Terminal Railroad Company*, 350 Ill. App. 63, 111 NE (2d) 707, and the case of *Brown, et al. vs. City of Sullivan*, 350 Ill. App. 400, 113 NE (2d) 208. An examination of the complaint in this case shows that there are no facts averred which would support the conclusion that the plaintiffs would suffer irreparable injury or be unduly prejudiced by the giving of notice.

For these reasons the order of the circuit court is reversed and the cause remanded with directions to allow the motion to dissolve and to dissolve the temporary injunction.

Reversed and remanded.

Scheineman, P.J., & Culbertson, J., concur.

Publish abstract only.

FILED  
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*David P. Malott*  
CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS



276 A

46061

|                          |   |                     |
|--------------------------|---|---------------------|
| FRITZ AUSTERMUEHLE and   | ) |                     |
| HILDA AUSTERMUEHLE,      | ) | APPEAL FROM COUNTY  |
| Appellants,              | ) |                     |
|                          | ) | COURT, COOK COUNTY. |
| v.                       | ) |                     |
| JOHN H. HASSELS and EDNA | ) |                     |
| C. HASSELS,              | ) |                     |
| Defendants.              | ) |                     |
|                          | ) |                     |
| EDNA C. HASSELS,         | ) |                     |
| Appellee.                | ) |                     |

351 I.A. 515<sup>2</sup>

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

On October 2, 1951 the parties entered into a written contract for the sale of a building. The complaint alleged that defendants represented that an apartment in the building was decontrolled and that the rent therefor was \$125 per month; that this representation was not true; that the apartment was subject to control, and that after the purchase, the Office of Rent Stabilization ordered the rent changed from \$125 to \$100 per month. The complaint was stricken upon motion, and the sole question presented to us by the briefs is whether the misrepresentation was as to a matter of law or of fact. The trial court held that it was a matter of law, sustained the motion, and dismissed the case.

It is a general rule that misrepresentation as to a matter of law does not constitute fraud, as knowledge of the law is equally available to all parties. However, the question as to whether an apartment was decontrolled, while based upon the federal law relating thereto, is by



no means merely a matter of legal interpretation. Under certain states of fact, premises were not subject to the operation of the rent control act and were considered "decontrolled," as the common phrase described exemption from the control act. A statement as to the amount of rent derived from premises or as to the status of leases is a fact upon which a buyer may rely, and if a misrepresentation is made with respect thereto, it is a material misrepresentation for which a purchaser may recover. Statements as to exemption from the rent control act are the equivalent of such representations.

Plaintiffs cite cases which support their position that this was a misrepresentation of fact. Solazzi v. Casola, 345 Ill. App. 407, 103 N.E. 2d 164; Halla v. Chicago Title & Trust Co., 412 Ill. 39; Sommer v. Kelly, 50 N.Y.S. 2d 66; Goerig v. Elliott, 27 Wash. 2d 600, 179 P. 2d 320; and Grasso v. DeMelik et al., 114 N.Y.S. 2d 884, 885. The opinion in Solazzi v. Casola, supra, was not printed in full, but the abstract of the decision, as reported in the Northeastern Reporter cited, reveals that it was a case in which the defendants represented that the rent ceiling on property conveyed was \$100 per month when, in fact, the ceiling was \$45. In the instant case, when the sellers stated that the apartment in question was decontrolled, it was, in effect, saying that there was no rent ceiling, although they, themselves, according to the complaint, filed a registration statement with





respect thereto after the making of the contract in question, thus acknowledging that it was subject to rent control. In Halla v. Chicago Title & Trust Co., supra, the plaintiff sought to rescind a contract to purchase real estate consisting of a three-story family residence. The question involved was whether the property was subject to rent control. The trial court found that the plaintiff knowingly made a false representation with respect to that fact and decreed a rescission. The Appellate court reversed and thereupon the case went to the Supreme court, which reversed the Appellate court and affirmed the trial court. The fact in that case upon which "decontrol" rested was whether or not a single family dwelling on the premises had been changed, altered, and converted into a multiple housing unit on and after February 1, 1947. It was later found that the property was subject to control, and the rental of the premises was reduced. The point was made there, as here, that the plaintiff should have ascertained the facts; that the law charged her with knowledge she might have obtained by making use of the means afforded her of acquiring that information and that she failed to avail herself thereof. The court held this was an issue to be decided in the light of all the facts of which the injured party had actual knowledge and also such as she might have availed herself of by ordinary prudence. This can be discovered only upon a trial. It does not appear from the complaint itself.



Defendants cite several cases in other jurisdictions which appear to take a contrary view. They are not in our opinion supported by the weight of authority.

Judgment is reversed and the cause remanded, with directions to the trial court to overrule the motion to strike and to require the defendants to answer.

Judgment reversed and cause  
remanded with directions.

Tuohy and Robson, JJ., concur.



277 A

46158

ROBERT HESTER, )  
Appellee, )  
  
v. )  
  
MID CENTRAL MOTORS, INC., )  
and SOUTH SIDE BANK & )  
TRUST COMPANY, an Illinois )  
corporation, doing business )  
under the Banking Laws of )  
the State of Illinois, )  
Defendants. )  
  
On Appeal of SOUTH SIDE )  
BANK & TRUST COMPANY, an )  
Illinois corporation, )  
Appellant. )

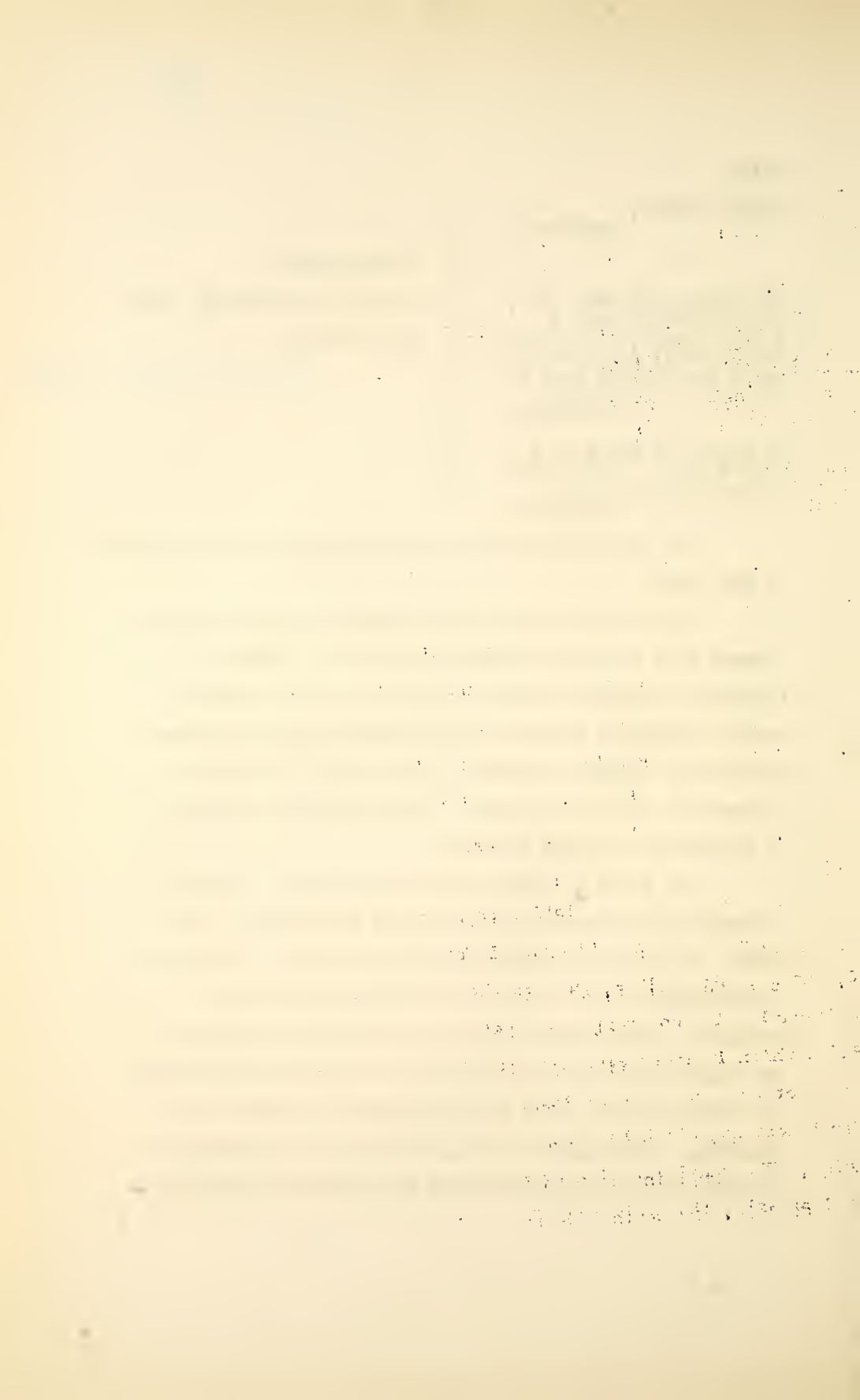
INTERLOCUTORY  
APPEAL FROM SUPERIOR COURT,  
COOK COUNTY.

351 I.A. 516

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION  
OF THE COURT.

This is an appeal by the South Side Bank & Trust  
Company from an order denying its motion to dissolve a  
temporary injunction issued without notice and without  
bond, restraining defendants from instituting garnishment  
proceedings against plaintiff, from selling a Cadillac  
automobile, and from selling a note executed by plaintiff  
or confessing judgment thereon.

On April 8, 1953 plaintiff purchased a Cadillac  
automobile from defendant Mid Central Motors, Inc. for  
\$4400. He paid down \$1400, and for the balance, executed  
a conditional sales contract and a note in the sum of  
\$3981.60, which included financing and interest charges.  
The contract and note were assigned to the South Side Bank  
and Trust Company, which had undertaken to provide the  
financing. The complaint alleges that after execution of  
the bill of sale, the South Side Bank & Trust Company on



April 11, 1953, instructed plaintiff to bring the automobile to its offices for the purpose of furnishing additional credit information; that plaintiff brought the automobile to the bank, and that it was there agreed that plaintiff would bring in the full amount of the balance on April 13, 1953; that plaintiff then looked over the contract, saw that it required twenty-four payments of \$165.90 each, and returned to the bank with his attorney and tendered it \$3,000, but that the bank then informed him that he would have to pay the total amount due on the contract, to-wit: \$3971.60; that he refused to do this; that the bank refused to accept \$3,000, refused to return the automobile to him, refused to return his original consideration of \$1400, and threatened to sell the note and contract and to take judgment against him. Plaintiff says he was not experienced in the technical terms of the contract and was lulled into a false sense of security. In the prayer portion of the complaint, plaintiff states that he believes if defendants had notice of the complaint, they would immediately make disposition of the notes, automobile, and other instruments, and that plaintiff would thereby suffer irreparable damages. To this, the bank filed an answer in which it denied that it instructed plaintiff it would be necessary for him to bring the automobile to its offices for the purpose of furnishing additional credit information, or that failing therein, the purchase of the automobile would have to be completed as a cash





transaction, and denied that it was agreed between plaintiff and defendants that plaintiff would return to the bank on April 13, 1953 and tender the balance of \$3000 in full settlement. It denied that a tender of \$3000 was made by plaintiff, and denied the other averments of the complaint with respect thereto. The bank stated the fact to be that the down payment of \$1400 was made directly to Mid Central Motors, Inc.; that the bank received no part of it and, therefore, did not have the power to return such sum to plaintiff. It denied that it had threatened to sell the note and contract or that it threatened to take judgment against plaintiff, and denied practically all other essential allegations of the complaint. The motion to dissolve is based principally upon the ground that no cause of action was stated against the defendant bank and that the temporary injunction was improperly issued without notice and without bond.

From an examination of the complaint and exhibits attached thereto, it is apparent that the conditional sales contract made by plaintiff with defendants contains such harsh and oppressive stipulations that no man ought to risk it, even for the sake of owning a Cadillac automobile. The photostatic copies of the bill of sale and note show them in such small print as to be almost impossible to read. If they are literally accurate, it may be questioned whether the documents are in understandable language. Still, taking all this into account, there is no adequate basis alleged

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in the complaint for the issuance of an injunction without notice and without bond. Only recently, this court has twice had occasion to call attention to the impropriety of the issuance of such an injunction, except under the most extraordinary circumstances. In Skarpinski v. Veterans of Foreign Wars, 343 Ill. App. 271, we pointed out that injunction is an extraordinary remedy, even when granted after issues have been joined and a hearing had; that in the most primitive concept of justice, a fundamental requisite for the exercise of judicial authority is notice; that exceptions to this rule are rare and embrace those cases in which the court feels that the defendant intends to and can destroy the substance of the litigation before the court can act. We held in that case that where an injunction is issued without notice in a case where notice should have been given, the court will reverse the case on that ground, without considering any other questions. This has been the law as laid down in decisions of this court for more than half a century. See also Republican Cent. Com. v. Cook Co. Regular Rep. Org., 348 Ill. App. 189. In one recent issue of the Illinois Appellate Reports, as indeed in almost every issue, are to be found two cases reversing orders granting temporary injunctions, Pearson v. Behrens, 350 Ill. App. 254, and Brown Music Co. v. City of Sullivan, 350 Ill. App. 400. While the conditions under which a bond may be excused are not as exacting as those which are required for the issuance of an injunction without notice, it is difficult



to find any language in this complaint which justifies the issuance of a temporary injunction without bond. Moreover, we must take into account the fact that a bank is an institution subject to public laws and regulations; that it is required to keep its doors open between certain hours and, therefore, could be brought into court on short notice. No allegations of insolvency were made, and we must assume that the bank is financially responsible. Used Cadillac cars are not articles of unique value and there does not appear to be anything here involved for which plaintiff could not be compensated in damages. The prospective garnishment of wages and the loss that would result therefrom is not set forth in positive averment, so that the court could see what harm would result from the service of such notice.

Order reversed and cause remanded, with directions to proceed in conformity with the views herein expressed.

Order reversed and cause remanded  
with directions.

Tuohy and Robson, JJ., concur.





45928

MARY L. NICHOLS,

v.

HERBERT BEARD,

Appellee,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

351 I.A. 566<sup>1</sup>

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an adverse judgment for possession of certain premises involved in plaintiff's action for forcible detainer.

Defendant was a tenant from week to week. The maximum rent paid under the U. S. Rent Control Act was \$8.00 per week. September 13, 1951, plaintiff filed a petition with the U. S. Housing Expediter for an adjustment of rent and an increase of rent to \$15.00 per week. After proper notices and hearing, the Rent Control Director on April 3, 1952, ordered the rent increased to \$10.20 per week, effective as of September 13, 1951. The authority for such an order is found in section 113 of the regulations adopted December 22, 1951, by the Office of the Federal Rent Control Director, published in the Federal Register, Volume 16. During the interim period, plaintiff accepted the maximum allowable rent of \$8.00 per week. Upon the entry of the order by the Director, plaintiff served a 5-day notice under the Forcible Detainer statute (Ill. Rev. Stat., Ch. 80, §8), demanding possession for failure to pay the increased rent ordered by the Director. Defendant's refusal to pay the increased rent of \$2.20 per week resulted in the instant action before a justice of the peace, where judgment for possession was entered for plaintiff. An appeal was taken from that judgment to the Circuit Court, where the judgment was confirmed. The instant appeal followed.



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|------------------|---|----------------|
| MARY L. NICHOLS, | ) | APPEAL FROM    |
| Appellee,        | ) |                |
| v.               | ) | CIRCUIT COURT, |
| HERBERT BEARD,   | ) |                |
| Appellant.       | ) | COOK COUNTY.   |

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an adverse judgment for possession of certain premises involved in plaintiff's action for forcible detainer.

Defendant was a tenant from week to week. The maximum rent paid under the U. S. Rent Control Act was \$8.00 per week. September 13, 1951, plaintiff filed a petition with the U. S. Housing Expediter for an adjustment of rent and an increase of rent to \$15.00 per week. After proper notices and hearing, the Rent Control Director on April 3, 1952, ordered the rent increased to \$10.20 per week, effective as of September 13, 1951. The authority for such an order is found in section 132, paragraph 2, Federal Rent Control Act of 1951. During the interim period, plaintiff accepted the maximum allowable rent of \$8.00 per week. Upon the entry of the order by the Director, plaintiff served a 5-day notice under the Forcible Detainer statute (Ill. Rev. Stat., Ch. 80, §8), demanding possession for failure to pay the increased rent ordered by the Director. Defendant's refusal to pay the increased rent of \$2.20 per week resulted in the instant action before a justice of the peace, where judgment for possession was entered for plaintiff. An appeal was taken from that judgment to the Circuit Court, where the judgment was confirmed. The instant appeal followed.



-2-

We find no merit in this appeal. The notice and demand for possession was in accordance with the Forcible Detainer statute. The acceptance of the maximum rent, pending the hearing before the Rent Director, was not a waiver of the right to the increase ordered by the Director.

The judgment is correct, and it is affirmed.

AFFIRMED.

KILEY AND LEWE, JJ. CONCUR.



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45916

THE PEOPLE OF THE STATE OF ILLINOIS:  
PHILLIP KOLIN, etc., et al.,

Plaintiffs - Appellants,

v.

JOHN LEITCH, et al.,

Defendants - Appellees,

and

THE HOME FOR DESTITUTE CRIPPLED  
CHILDREN, etc., et al.,

Defendants.

351 I.A. 566<sup>2</sup>

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This cause was dismissed for want of equity upon the motion of defendants St. George School for Girls, Leitch, Hayes, Strucker and Williams, on the ground that the amendment to the amended complaint and the amended complaint do not state a cause of action. Plaintiffs appeal.

By their motion defendants admit the facts alleged in the complaint but question their sufficiency in law. In considering this motion we are limited to the facts stated in the amendment to the amended complaint and the amended complaint. (Sheaff v. Spindler, 339 Ill. 540.)

St. George School for Girls, hereinafter called "the school" was incorporated in 1920 as an Illinois not-for-profit corporation, to educate and develop children whose parents have died, disagreed or are so occupied that they cannot give their child or children the necessary attention for their care, education and development to the end that they become useful, loyal and patriotic citizens of the United States of America.





Since 1923 funds necessary to operate the school have been received from the income of a charitable trust created by George J. Williams, now deceased. Under the terms of the trust the net income of the trust fund is subject to the order of the board of directors of the school. Defendant Leitch is the present trustee of the Williams trust fund. January 17, 1950 the board of directors of the school took steps to shut down the school permanently for the reason that the income from the trust fund together with the tuition fees was insufficient to maintain its operation. Members of St. George Parents Committee of the school raised a fund, a portion of which was turned over to the board of directors of the school, to cover an operating deficit. As a result the board of directors continued to operate the school for the remainder of the academic year of 1950. Later the school was closed.

The amended complaint charges that the members of the board of directors have violated their fiduciary duties to the beneficiaries of the school and that defendant Leitch as the sole trustee of the Williams Trust fund has violated his fiduciary duties both as a member of the board of directors and as the sole trustee of the trust fund by failing to make an attempt to use available trust funds for the continued operation of the school.

The amended complaint prays for a temporary injunction, removal of the members of the board of directors of the school and Leitch as trustee of the Williams Trust fund, and the appointment of a receiver. The amendment to

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the amended complaint asks that the court take possession of the physical assets and all intangible property rights of the school, and that by the exercise of its equitable jurisdiction under the cy pres doctrine the court appoint new trustees to operate the school in accordance with any plan the court may designate, and for general relief.

In Kolin v. Leitch, 343 Ill. App. 622, where we dealt with other aspects of this case, the allegations of the amended complaint are recited in greater detail.

Plaintiffs' principal contentions are that the defendant school directors violated their fiduciary obligations by closing the school, and that if defendants were correct in claiming operation of the school was no longer practicable the trial court erred in failing to apply the equitable doctrine of cy pres.

In Kolin v. Leitch, 343 Ill. App. 622, at page 629, this court said: "The amended complaint does not allege fraud and so far as the pleadings show defendants in exercising their discretion acted in good faith." The amendment to the amended complaint was filed August 31, 1950, after this court had filed the foregoing opinion. It alleges that the original intent of George J. Williams in founding the school was that the school "should go on forever"; that the board of directors apparently was of the belief that the said school could not be operated without suffering a deficit but took no action with regard to attempting to increase the income either by increasing the student body, soliciting, obtaining, or accepting donations or gifts, increasing the



tuition of students, obtaining more money from the trustee of the said Williams Trust, obtaining moneys from various public authorities such as lunch money from the officials of the County of Cook; that the board of directors made no attempt to come into a court of chancery for the purpose of asking instructions of the court as to what should be done with regard to continued operation or termination or any change in the operation of the school; that the board of directors have indicated their belief that the original intent of said George J. Williams cannot be carried out at the present location of the school by the use, operation and occupancy of the school at said premises; that the Illinois Institute of Technology has indicated that it, if given complete control over the land and buildings of the property of said school, could carry out the general intent of the Williams Trust; and that for various reasons it has become impossible for the board of directors to carry out the original intent of the Williams Trust but that the intent could be carried out by the Illinois Institute of Technology either through the removal of the present board of directors of the school and the appointment of new directors by the court under its equitable jurisdiction or by the application of the doctrine of cy pres.

In our former opinion, 343 Ill. App. 622, at page 629, we pointed out that the closing of the school does not terminate the trust. Although the trust agreement states that the trust "is to continue in perpetuity for the use and benefit of the school," it also provides for a number of





contingencies so that there never could be a failure of beneficiaries. All of the beneficiaries named in the trust agreement in the event the school is no longer maintained are required to be "corporations, institutions or organizations not conducted for profit having for their purpose the care of little children." This appears to be the dominant purpose of the trust agreement.

No duty is imposed by law upon the directors of the school to solicit donations to cover the operating deficits incurred by the school, nor are the directors required to give complete control over the land and buildings of the school to a beneficiary unnamed in the trust agreement. In another appeal, Kolin v. Leitch, 113 N. E. 2d 806, we held that the directors of the school "could, in the exercise of their discretion, determine when to use the income of the George Williams Trust to meet the operating deficit."

Plaintiffs insist that the Act governing corporations not for profit cannot oust a court of equity from its inherent general jurisdiction over charitable organizations and that the directors of a charitable organization have the same obligations as trustees of a charitable trust. In support of their contention plaintiffs have cited numerous cases in this state and other jurisdictions. None of these decisions are strictly in point. In the recent case of Continental Nat. Bank v. Sever, 393 Ill. 81, involving the construction of a will, the court said at page 93:



"At this time the query is pertinent as to the power which a court of equity possesses and may exercise in advising and directing a trustee in reference to the trust. Such a court has original and inherent jurisdiction to respond to the request of trustees for advice, protection and guidance as to doubtful questions touching the trustee's powers and duties. (Village of Hinsdale v. Chicago City Missionary Society, 375 Ill. 220; Maguire v. City of Macomb, 293 Ill. 441.) Courts of equity will not, however, interfere with the exercise of the discretionary powers of a trustee in the absence of proof of fraud, bad faith, or abuse of discretion, nor will they undertake to exercise a discretion which, by the instrument creating the trust, has been left to the trustee. Martin v. McCune, 318 Ill. 585; Fischer v. Butz, 224 Ill. 379."

While the facts of that case are dissimilar to those of the present case we think the principle emerging is applicable here, where the directors of the school, so far as the pleadings show, exercised their discretionary powers honestly and reasonably.

In Ayres v. Hadaway, 303 Mich. 586, 6 NW2d 925, the court said:

"It is a well-settled rule of law that the authority of the directors is absolute when they act within the law, and that questions of policy and internal management are, in the absence of nonfeasance, misfeasance, or malfeasance, left wholly to their decision. \* \* \* While the rule above announced applies to so-called profit corporations, yet the same rule applies to nonprofit corporations. Cicotte v. Anciaux, 53 Mich. 227, 18 N.W. 793."

From a careful reading of the allegations of the amendment to the amended complaint and the amended complaint, we are of the opinion that the facts alleged do not warrant the intervention of a court of equity and the suit was therefore properly dismissed.

For the reasons given, the judgment is affirmed.

JUDGMENT AFFIRMED.

KILEY, J. CONCURS.

FEINBERG, P.J. TOOK NO PART.



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|---------------------|-------------|---|-----------------------------|
| OLGA VILETA,        | Appellee,   | ) |                             |
|                     |             | ) | INTERLOCUTORY               |
| v.                  |             | ) |                             |
|                     |             | ) | APPEAL FROM SUPERIOR COURT, |
| JOHN VILETA et al., | Appellants. | ) | COOK COUNTY.                |
|                     |             | ) |                             |
| EDWARD VILETA,      | Appellee.   | ) |                             |

351 I.A. 567

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a temporary order of the Superior Court of Cook County restraining the administrator of the estate of Barbara Vileta from proceeding with the sale of real estate in the Probate Court of Cook County and from a further order denying defendants' motion to dissolve said injunction.

Plaintiff Olga Vileta, grantee of an undivided one-seventh interest in certain real estate in Cook County, Illinois, filed a suit to partition said real estate on January 16, 1953. The interest owned by plaintiff had been received by her in a property settlement arising out of a divorce case, from defendant Edward Vileta. The latter had acquired this interest as heir of his mother, Barbara Vileta, who died September 17, 1951. On February 2, 1953, some 16 months after the mother's death and subsequent to the filing of the partition suit, defendants opened an estate in the Probate Court of Cook County, and the administrator filed his petition to sell the real estate in question to pay



debts. Claims in the sum of \$5,610.80 were filed and allowed, without objection, the claimants being heirs at law and next of kin of decedent and being the defendants in the partition suit. No estate having been opened at the time the chancery court acquired jurisdiction by virtue of the filing of the bill for partition, upon motion of the plaintiff in the partition suit the chancellor entered the injunctional order here contested.

Defendants contend (1) that the Probate Court has original jurisdiction in cases involving sale of real estate of deceased persons for the payment of debts and that a court of chancery should not, except in extraordinary cases, supersede the Probate Court in administration of an estate; and (2) that the injunction in the instant case was wrongfully issued inasmuch as no bond was required or filed.

While it is true that the Probate Court has original jurisdiction in cases involving the sale of real estate to pay debts, in the instant case a court of equity acquired jurisdiction by virtue of a partition suit. Equity is not deprived of jurisdiction by virtue of the subsequent opening of an estate in the Probate Court and filing of a petition to sell real estate. In the case of Wachter v. Doerr, 210 Ill. 242, where a similar contention was made, the court said (pp. 244-245):

"At the time the suit was commenced the period allowed by the statute for the presentation of claims against the estate of John Doerr had not expired, and





there was no proof whatever as to the debts or liabilities of the estate. For aught that appears, the administrator might be compelled to resort to a sale of the real estate for the payment of debts. The heirs held the premises as tenants in common charged with debts of the estate, if any should be established in the probate court within the statutory period, and if the premises should be partitioned the portion allotted to one heir might afterward be sold by the administrator to pay debts. The creditor would not be barred by the decree in the partition suit. (Sutton v. Read, 176 Ill. 69.) If the suit should result in a sale of the premises, the purchaser would take title subject to the claims of the creditors. \* \* \* In some States a proceeding for partition before an estate has been settled or the time allowed for that purpose has expired has been held to be premature, and in others a suit for partition before that time is prohibited by statute. \* \* \* We have not held that the proceeding cannot be instituted but have condemned the practice of taking decrees before it can be known whether or not it will be necessary to sell the land to pay debts. (Sutton v. Read, supra.)"

In Watke v. Stine, 214 Ill. 563, the court said  
(pp. 567-568):

"Partition may be made or, if the premises are not divisible, a decree of sale may be entered prior to the expiration of the period for probating claims against an estate, as recently held in Hall v. Gabbert, 213 Ill. 208. As there indicated, however, it will be the duty of the court in the case at bar, upon the report of sale coming in, to take additional proof and to make such an order in reference to the distribution of the proceeds of the sale as will insure their application, so far as may be necessary, to the satisfaction of the claims of the creditors of the estate."

In Hall v. Gabbert, 213 Ill. 208, the court said  
(pp. 217-218):

"The parties in interest in the land are adults. The right of partition is fixed by statute, and where the rights of minors or infants are not involved the court may not refuse to declare the rights of the parties claiming to be owners of the land and decree partition among them according to their rights. \* \* \* While the practice is not approved or commended of making actual partition or sale under such proceeding prior to the settlement of estates, we are not prepared to hold, under our statute, that a decree for either is



reversible error. The creditor cannot be injured thereby, for if actual partition is had the lands are still subject to sale, and if a sale in partition is had the purchaser likewise takes subject to the charge of the debts of the ancestor, and the rule caveat emptor applies."

In the instant case the rights of the alleged creditors, who are the defendants to the partition suit, may be fully and completely adjudicated in the court of equity, which unquestionably has jurisdiction. In Wachter v. Doerr above, the court said (p. 245):

"When the debts of the estate have been ascertained, if a sale is to be made in a partition suit it is proper to order the payment of a sufficient sum to the administrator to pay the debts which are a charge upon the estate."

Defendants contend further that the injunction was void because it was given without bond. We have searched the record and it does not appear that any bond was requested below or that any objection was raised to the issuance of the injunction on that ground. It is well settled that a court of review will not consider objections which were not raised below.

Accordingly, the orders of the Superior Court appealed from are affirmed.

Orders affirmed.

Schwartz, P. J., and Robson, J., concur.



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## Abstract

Gen. No. 10688

Agenda No. 1.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
MAY TERM, A. D. 1953.

351 I.A. 568

NITA BISHOP,  
Appellee-Plaintiff, )  
vs. )  
STEVE G. IDEN,  
Appellant-Defendant. )

Appeal from  
Circuit Court,  
Du Page County.

WOLFE,-- J.

On the 3rd day of October 1950, Nita Bishop was riding as a guest and gratuitous passenger in an automobile owned and operated by Steve G. Iden. The car was being driven along Lake Street in a westerly direction. Lake Street is a public highway in, or near the City of Elmhurst, in Du Page County, Illinois. This street is a four-lane paved highway and runs in an easterly and westerly direction. Berteau Street intersects Lake Street in the City of Elmhurst. This street runs in a northerly and southerly direction. As Iden's car approached Berteau Street he made a left turn off of Lake Street preparatory to entering Berteau Street. As he was making the turn, a tractor truck being driven in an easterly

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REPORT OF THE  
COMMISSIONER OF THE  
LAND OFFICE

1919-1920-1921-1922-1923-1924-1925-1926-1927-1928-1929-1930-1931-1932-1933-1934-1935-1936-1937-1938-1939-1940-1941-1942-1943-1944-1945-1946-1947-1948-1949-1950-1951-1952-1953-1954-1955-1956-1957-1958-1959-1960-1961-1962-1963-1964-1965-1966-1967-1968-1969-1970-1971-1972-1973-1974-1975-1976-1977-1978-1979-1980-1981-1982-1983-1984-1985-1986-1987-1988-1989-1990-1991-1992-1993-1994-1995-1996-1997-1998-1999-2000-2001-2002-2003-2004-2005-2006-2007-2008-2009-2010-2011-2012-2013-2014-2015-2016-2017-2018-2019-2020-2021-2022-2023-2024-2025-2026-2027-2028-2029-2030-2031-2032-2033-2034-2035-2036-2037-2038-2039-2040-2041-2042-2043-2044-2045-2046-2047-2048-2049-2050-2051-2052-2053-2054-2055-2056-2057-2058-2059-2060-2061-2062-2063-2064-2065-2066-2067-2068-2069-2070-2071-2072-2073-2074-2075-2076-2077-2078-2079-2080-2081-2082-2083-2084-2085-2086-2087-2088-2089-2090-2091-2092-2093-2094-2095-2096-2097-2098-2099-2100-2101-2102-2103-2104-2105-2106-2107-2108-2109-2110-2111-2112-2113-2114-2115-2116-2117-2118-2119-2120-2121-2122-2123-2124-2125-2126-2127-2128-2129-2130-2131-2132-2133-2134-2135-2136-2137-2138-2139-2140-2141-2142-2143-2144-2145-2146-2147-2148-2149-2150-2151-2152-2153-2154-2155-2156-2157-2158-2159-2160-2161-2162-2163-2164-2165-2166-2167-2168-2169-2170-2171-2172-2173-2174-2175-2176-2177-2178-2179-2180-2181-2182-2183-2184-2185-2186-2187-2188-2189-2190-2191-2192-2193-2194-2195-2196-2197-2198-2199-2200-2201-2202-2203-2204-2205-2206-2207-2208-2209-2210-2211-2212-2213-2214-2215-2216-2217-2218-2219-2220-2221-2222-2223-2224-2225-2226-2227-2228-2229-2230-2231-2232-2233-2234-2235-2236-2237-2238-2239-2240-2241-2242-2243-2244-2245-2246-2247-2248-2249-2250-2251-2252-2253-2254-2255-2256-2257-2258-2259-2260-2261-2262-2263-2264-2265-2266-2267-2268-2269-2270-2271-2272-2273-2274-2275-2276-2277-2278-2279-2280-2281-2282-2283-2284-2285-2286-2287-2288-2289-2290-2291-2292-2293-2294-2295-2296-2297-2298-2299-2300-2301-2302-2303-2304-2305-2306-2307-2308-2309-2310-2311-2312-2313-2314-2315-2316-2317-2318-2319-2320-2321-2322-2323-2324-2325-2326-2327-2328-2329-2330-2331-2332-2333-2334-2335-2336-2337-2338-2339-2340-2341-2342-2343-2344-2345-2346-2347-2348-2349-2350-2351-2352-2353-2354-2355-2356-2357-2358-2359-2360-2361-2362-2363-2364-2365-2366-2367-2368-2369-2370-2371-2372-2373-2374-2375-2376-2377-2378-2379-2380-2381-2382-2383-2384-2385-2386-2387-2388-2389-2390-2391-2392-2393-2394-2395-2396-2397-2398-2399-2400-2401-2402-2403-2404-2405-2406-2407-2408-2409-2410-2411-2412-2413-2414-2415-2416-2417-2418-2419-2420-2421-2422-2423-2424-2425-2426-2427-2428-2429-2430-2431-2432-2433-2434-2435-2436-2437-2438-2439-2440-2441-2442-2443-2444-2445-2446-2447-2448-2449-2450-2451-2452-2453-2454-2455-2456-2457-2458-2459-2460-2461-2462-2463-2464-2465-2466-2467-2468-2469-2470-2471-2472-2473-2474-2475-2476-2477-2478-2479-2480-2481-2482-2483-2484-2485-2486-2487-2488-2489-2490-2491-2492-2493-2494-2495-2496-2497-2498-2499-2500-2501-2502-2503-2504-2505-2506-2507-2508-2509-2510-2511-2512-2513-2514-2515-2516-2517-2518-2519-2520-2521-2522-2523-2524-2525-2526-2527-2528-2529-2530-2531-2532-2533-2534-2535-2536-2537-2538-2539-2540-2541-2542-2543-2544-2545-2546-2547-2548-2549-2550-2551-2552-2553-2554-2555-2556-2557-2558-2559-2560-2561-2562-2563-2564-2565-2566-2567-2568-2569-2570-2571-2572-2573-2574-2575-2576-2577-2578-2579-2580-2581-2582-2583-2584-2585-2586-2587-2588-2589-2590-2591-2592-2593-2594-2595-2596-2597-2598-2599-2600-2601-2602-2603-2604-2605-2606-2607-2608-2609-2610-2611-2612-2613-2614-2615-2616-2617-2618-2619-2620-2621-2622-2623-2624-2625-2626-2627-2628-2629-2630-2631-2632-2633-2634-2635-2636-2637-2638-2639-2640-2641-2642-2643-2644-2645-2646-2647-2648-2649-2650-2651-2652-2653-2654-2655-2656-2657-2658-2659-2660-2661-2662-2663-2664-2665-2666-2667-2668-2669-2670-2671-2672-2673-2674-2675-2676-2677-2678-2679-2680-2681-2682-2683-2684-2685-2686-2687-2688-2689-2690-2691-2692-2693-2694-2695-2696-2697-2698-2699-2700-2701-2702-2703-2704-2705-2706-2707-2708-2709-2710-2711-2712-2713-2714-2715-2716-2717-2718-2719-2720-2721-2722-2723-2724-2725-2726-2727-2728-2729-2730-2731-2732-2733-2734-2735-2736-2737

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Abstracts are available in microfiche format. A fee will

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direction on Lake Street collided with the car of Iden, and Nita Bishop was seriously injured thereby.

Nita Bishop started a suit in the Circuit Court of Du Page County, alleging that Steve G. Iden operated his car in a wilful and wanton manner in making the turn that he did, and as a direct and proximate result of his wilful and wanton misconduct, she was seriously injured. The defendant filed an answer in which he denied that he was guilty of any wilful and wanton misconduct that was the proximate cause of plaintiff's injuries. The case was submitted to a jury. At the close of the evidence the defendant entered a motion for a directed verdict. This motion was denied. The jury found the issues in favor of the plaintiff and assessed her damages at \$5,000. The defendant entered motions for judgment notwithstanding the verdict, and also for a new trial. Both of these motions were denied and judgment entered on the verdict. It is from this judgment that the defendant has brought the case to this Court on appeal.

The evidence shows that as the appellant was approaching Berteau Street, he observed the lights of a car which turned out to be on a truck approaching him from the west. He states it was difficult for him to state how far west it was when he first saw it, but estimates the distance between three and four hundred feet. There is no question but that appellant was driving his car very slowly at the time he started to make the turn. He seems to be confused in regard to the distance he was east of the intersection of Berteau Street at the time

direction on each side of the road and the car was stopped.

The driver was seen to get out of the car and

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he first saw these lights on the approaching car. One place he says twenty feet, another he says fifty. He also states that he thought this approaching car was traveling at the rate of seventy feet per second. He stated that after he saw the lights approaching and he started to make the turn, he paid no more attention to the approaching car, but was looking where he was going. His car then collided with the truck. The truck driver in order to avoid a collision, turned his vehicle sharply to the left so that the right side of the Iden car collided with the right side of his tractor. Mrs. Bishop was riding in the front seat beside Mr. Iden and as a result of the collision she was badly injured. There was no question raised that the jury's verdict is excessive.

Over the objection of the defendant three photographs were admitted in evidence showing Lake Street at the intersection of Berteau Street. It is not contended that the photographs do not properly represent the streets in question, but that the evidence shows that this accident occurred on a dark night, and it is the contention of the defendant that for these photographs to be admitted in evidence they must represent the condition as it existed at the time of the collision of the cars. The case of *Birnbaum vs. Kirchner*, 337 Ill. App. Page 25, was a personal injury suit, and the accident happened when it was dark. Photographs of the scene of the accident were taken in the daytime some time afterwards. The photographs were offered in evidence and admitted over the objection of the



In this case there is no question of the  
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defendant. The photographs, (as in this case,) were properly identified, and the Court there held that it was proper to admit them in evidence. In the present case the photographs were offered and admitted in evidence for showing the location of the accident only. We do not see how the defendant in any way could be prejudiced by the admission of these photographs in evidence, and we think the trial court did not abuse his discretion in admitting them into evidence.

In the defendant's motion for judgment notwithstanding the verdict, and he now insists that the evidence in this case does not show wilful and wanton misconduct on the part of the defendant, that was the proximate cause of the plaintiff's injuries. The defendant does not claim that the jury was not properly instructed as to the law of wilful and wanton misconduct. It appears to be a mistake in the abstract, as on Page 59 of the same it states: "The following instructions were tendered and refused by the Court and so marked." Then follows forty-three instructions. An examination of the record discloses that all but two of these instructions were given, so the jury was properly instructed in regard to the law of the case.

This case like every other case where it is claimed that wilful and wanton misconduct on the part of the defendant was the cause of the plaintiff's injuries, must be judged solely upon the facts as are disclosed in the record, and sometimes the dividing line between wilful and wanton misconduct and ordinarily what might be termed gross negligence, is hard to differentiate. If there is any evidence that tends to show





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wilful and wanton misconduct on the part of the defendant, then the case should be submitted to the jury under proper instructions, and it is their province to decide whether the acts constituted wilful and wanton misconduct on the part of the defendant. *Countryman vs. Sullivan* 344 Ill. App. 371, and *Bliss vs. Knapp* 331 Ill. App. 45.

It is also insisted by the appellant that the plaintiff herself was guilty of wilful and wanton misconduct by not warning the driver of the car that the truck was approaching. She did warn him just a short time before the cars collided. Whether she should have warned him sooner, would be a question of fact for the jury, because the defendant himself saw the lights from the approaching car at practically the same time that the plaintiff says she saw them. In *Bliss vs. Knapp*, *supra*, after reviewing other cases in regard to the duty of a passenger to warn the driver of approaching danger, we use this language: "It is difficult to understand how witnesses could honestly disagree so completely on how this accident happened. The version of plaintiff's and defendant's witnesses are irreconcilable and in hopeless conflict. As we have often declared, it is not the province of this court to substitute its judgment for that of the jury, or to upset the verdict even if it were to reach a contrary conclusion, for that would be invading the constitutional prerogative of the jury. (*Shevaller v. Seager*, 121 Ill. 564, 569; *Antosz v. Goss Motors, Inc.*, 311 Ill. App. 254; *Smith v. Courtney*, 281 Ill. App. 530.)

In the *Smith* case, *supra*, which involved a head-on





collision between vehicles traveling in opposite directions, the court stated at p. 535 with reference to a conflict in the evidence similar to that in the case at bar:

"It was for the jury to say whose evidence they would believe as true and since they have adopted the evidence of the plaintiff as being the more credible and the same having been approved by the trial court, this court would not be warranted in reversing the judgment on the grounds that the verdict was not supported by a preponderance of the evidence."

"In the instant case, therefore, the circuit court did not commit error in denying defendant's motion for a new trial, for the verdict of the jury was not against the manifest weight of the evidence.

"The court will next consider the propriety of the circuit court's refusal to give the jury certain instructions with reference to contributory negligence submitted by the defendant.

"Refused instruction No. 4 informed the jury that if a passenger has an opportunity to learn of danger and avoid it, it is his duty to warn the driver of such danger.

"This instruction constitutes an incomplete, and hence an inaccurate statement of the law inasmuch as it omits the essential elements of whether or not plaintiff saw the defendant's car before the driver did, whether he could have given warning, and whether the warning, if given, would have averted the accident. Moreover, it does not define the degree of diligence required of plaintiff in learning of the danger.

...the court stated in 1977 that the evidence in the case was not sufficient to establish that the defendant was guilty of the crime.

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With reference to community facilities provided by the District's water system, it has been determined that the water will not include the property of the

1. It is the duty of every citizen to support the Government and its laws.

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(Avey v. Medaris, 272 Ill. App. 207, 210; St. Clair Nat. Bank of Belleville v. Monaghan, 256 Ill. App. 471.)"

It is our conclusion that whether the defendant was guilty of wilful and wanton misconduct that was the proximate cause of the plaintiff's injuries, and whether she herself was guilty of any wanton and wilful misconduct that proximately contributed to her injuries were questions of fact to be submitted to the jury. They have found these issues in favor of the plaintiff. We cannot say that their findings are against the manifest weight of the evidence.

The judgment appealed from should be and is affirmed.

Judgment affirmed.



leave it to the jury to determine whether the evidence is sufficient to establish the defendant's guilt.

It is the duty of the jury to determine whether the evidence is sufficient to establish the defendant's guilt.

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It is the duty of the jury to determine whether the evidence is sufficient to establish the defendant's guilt.

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Abstract

Gen. No. 10704 & 10693 (Consolidated)

Agenda No. 4.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT.  
OCTOBER TERM, A. D. 1953.

WILLIAM G. ANGELOS,  
Plaintiff-Appellant,  
vs.  
ELEANOR RAE DITTMAN,  
Defendant-Appellee.

}  
}  
}  
}  
}  
} Appeal from the  
Circuit Court of  
Stephenson County,  
Illinois.

WOLFE,-- J.

The appellant, William G. Angelos, filed a suit in the Circuit Court of Stephenson County, against Eleanor Rae Dittman stating that at the request of Mrs. Dittman he procured a lease and an option to buy her theater building, and that Mrs. Dittman signed the lease and later sold the building to the lessee. The lease was dated August 1, 1939, and the suit was started November 8, 1950. The amended complaint was filed June 13, 1952, and contains two counts. In the first count plaintiff seeks to recover two per cent of the gross rentals as commission for leasing the theater, which amounts to \$1,940. The second count asks \$6,625, as commission for the sale of the property, this being five





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per cent of the gross price paid for the theater.

The first count of the amended complaint alleges an express oral contract to pay when the defendant shall have funds to pay her debts, and enough to live on. The second count alleges that the defendant employed the plaintiff to procure a lessee for said premises who would enter into a lease with the defendant, as lessor, upon the terms, conditions, provisions, options and covenants contained in the lease attached thereto, as Exhibit A and alleges further, that in consideration of the services to be performed, the defendant impliedly agreed with plaintiff to pay him compensation for his services.

The defendant filed a motion to dismiss Count 1 of the amended complaint on the ground that it showed on its face that its action was barred by the Statute of Limitations and also dismiss Count 2 on the ground that it appeared barred by the Statute of Frauds and the Statute of Limitations. The Court sustained the motion to strike Count 1, but denied as to Count 2. Plaintiff elected to stand on Count 1, and not to plead over and final judgment was entered against him on this Count. The defendant filed an answer as to Count 2, which pleaded as affirmative defenses, the Statute of Frauds and the Statute of Limitations. These affirmative defenses were stricken by the Court upon the plaintiff's motion.

The case went to trial before a jury on Count 2. At the trial the defendant made a motion for a directed verdict in the plaintiff's case, which was denied. At the

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As a result, the following model will be used for all JCR

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the Department of the Interior, and the Bureau of

Source: The author's original data on 1000 cases.

as the first five defendants were a minor for a third time.

3.

close of all the evidence, the plaintiff moved for a directed verdict, and the defendant renewed her motion for a directed verdict. Both motions were denied. After all the evidence had been presented and both sides had rested, plaintiff entered a motion to amend his complaint by striking all the words in Paragraph 3, following the word 'premises.' The whole paragraph is as follows: "3. That during the month of July, 1939 the defendant employed the plaintiff to procure a lessee for said premises who would enter into a lease with defendant as lessor on the terms, conditions, provisions, options and covenants contained in the lease attached hereto as "Exhibit A" and incorporated herein by reference." The part requested to be stricken out would leave the paragraph to read: "That during the month of July 1939, the defendant employed the plaintiff to procure a lessee for said premises." The Court denied this motion. The jury found the issues in favor of the defendant. The plaintiff entered a motion for judgment notwithstanding the verdict, and for a new trial. These motions were denied and judgment entered upon the verdict, and it is from this judgment that the appeal is prosecuted to this Court.

The question of whether the defendant employed the plaintiff to procure a lease for her is not in dispute, but there is a sharp conflict in the evidence whether the defendant asked the plaintiff to procure a lease for the premises with an option to buy the premises.



[illegible]

4.

The plaintiff's theory of the case is that Count 1, of the complaint is not subject to the defense of the Statute of Limitations, since it alleges a promise to pay upon the happening of a contingency, and it alleges that the contingency occurred on or about the 21st day of October, 1950, which was less than five years from the commencement of the suit. The defendant insists that this was a definite promise to pay within a reasonable time after the date of the promise. This Court in the case of Folkerts vs. Shields, 319 Ill. App. 261 had a similar case before us and in it we use this language: "Appellants urge that a written obligation to pay a definite sum "as soon as possible," or "as soon as able," is an absolute promise to pay, and enforceable in an action at law after the lapse of a reasonable time. The instrument sued on was executed in December 1935. This suit was commenced in July 1941. The complaint charged and appellants urge that a reasonable time had elapsed between the date of the instrument and the filing of the suit.

"The various jurisdictions are not in accord on this question. Many of them hold that a promise to pay "as soon as possible," or when the promisor "is able" is an absolute, and not a conditional promise, and will be considered a promise to pay within a reasonable time. We are of the opinion this State adheres to such rule."

The appellant insists that what would be a reasonable time is a question of fact, and should have been submitted to the jury. On the other hand the appellee contends that when





5.

the facts are not in dispute, it then becomes a question of law and should be decided by the Court. In the case of *Grand Lodge vs. Clark*, Supreme Court of Indiana in 127 *Northeastern Reporter* 280, after discussing the facts in the case, it is there stated: "In such cases a reasonable time is ordinarily a question of fact for the jury, but where the facts have been ascertained, or when they are undisputed or admitted, it becomes a question of law."

In *Marsh vs. Brown County* Supreme Court of Kansas, 23 *Pacific Reporter*, Second Series, Page 465, the syllabus is written by the Court and the 4th and 5th Paragraphs are as follows: "What is a reasonable time is ordinarily a question for the jury, but where the facts are not disputed the court may, as a matter of law, say whether the demand has been made in a reasonable time."

"If no reasons to the contrary appear, a reasonable time in which to make demand for performance, under circumstances as above set forth, would be not in excess of that period of time in which an action on a contract not in writing might be brought, or three years." Later in the decision of the case we find this language: "It is established law in this state that when some preliminary action is an essential prerequisite to the bringing of a suit, and such action rests with the claimant, he cannot defeat the operation of the statute of limitations by long and unnecessary delay in taking the antecedent step, and the statute will begin to run within a reasonable time after the party could, by his own act,





perfect his right, which reasonable time will not, in any event, extend beyond the statutory time fixed for bringing the suit. This doctrine has been stated and restated, illustrated and illuminated, applied and reapplied, until it has become a truism."

We think the Court properly held that under the circumstances in this case that the suit, having been started eleven years, three months and seven days after the lease was signed, what was a reasonable time for starting the suit was a question of law instead of fact, and properly sustained a motion to strike the first count of the plaintiff's complaint.

The appellant insists that there was no question of fact to be submitted to the jury, and that his motion for a directed verdict should have been sustained at the close of the evidence. An examination of the record discloses that the plaintiff demanded a trial by jury at the time he filed his complaint, and must have been under the impression there was a question of fact to be submitted to the jury. At the close of the case plaintiff requested and the Court gave instructions on the plaintiff's theory of the case. In Walker vs. Freeman 209 Ill. Page 17,-- the question there involved is whether certain letters constitute a promise to pay a debt that had been barred by the Statute of Limitations. This question was submitted to the jury and the appellant then contends it was a question of fact for the Court to decide as a matter of law. The Court held that it was a question of law that





7.

should have been decided by the Court, but they go on to say in their opinion: "But appellant is in no condition to complain of this error, as he asked, and the court gave, instructions upon the same theory and asked the court to submit to the jury five special findings." We are of the opinion there were questions of fact for the jury to decide, but the appellant is not in a position to raise the question here.

It will be observed that there was no contract by the plaintiff and the defendant to sell this property. The lease only provided that the lessee should have an option to buy the building on certain conditions. The lessee was under no obligation whatsoever, to purchase this property, but it did bind the defendant to sell it if the lessee decided to exercise his option and buy it. There is no question but what the sale was made. The complaint alleges that the plaintiff was employed by the defendant to procure a lease with an option to purchase the property. The defendant denies such allegation. Then it became a question of fact for the jury to decide whether he was employed for that purpose. We think the evidence pertaining to that matter was competent. It is not contended by the defendant that she was not bound by this option to sell the property, but she does contend that the plaintiff had nothing to do with the sale of the property. This was a question of fact for the jury to decide, under proper instructions from the Court.

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in their opinion: "The appellant is in no position to  
complain of this error, as he asked, and the court gave,  
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question but what the defendant was bound to sell the property  
if the plaintiff was satisfied by the defendant to purchase  
it under the option to purchase the property. The  
defendant denied such allegations. When it became a question  
of fact for the jury to decide whether he was satisfied for  
that purpose. We think the evidence pertaining to that matter  
was competent. It is not contended by the defendant that she  
was not bound by this option to sell the property, but she  
does contend that the plaintiff was not to be held to the  
sale of the property. This was a question of fact for the  
jury to decide, under proper instructions from the court.

The Court gave to the jury the following instruction:

"The jury are instructed that the plaintiff's cause of action in this case is a claim made by him as broker for compensation, by way of commissions, upon a sale of certain property, situated in the City of Freeport, known as the Freeport Theater, in the month of October 1951, and that to entitle him to recover such, or any compensation on account of said sale, the jury must believe from the evidence in the case that the plaintiff was employed by the defendant in and about the business of making said sale, and that his services were instrumental in accomplishing it."

The appellant contends that the Court erred in giving this instruction as inconsistent with one that he had given on behalf of the plaintiff. In addition to the instruction given on behalf of the defendant, the Court also instructed the jury in the following manner: "You are further instructed that before the plaintiff is entitled to recover in this case he must prove by a preponderance or a greater weight of the evidence that the defendant employed him to procure a purchaser for the property in question, and that the plaintiff in pursuance of said employment found a person and sent him to the defendant, and that said person either purchased said property or was willing, ready and able to purchase said property according to the terms under which the plaintiff was employed to obtain, and unless you so believe from the greater weight of the evidence then you should find for the defendant." The



The Court says in the first of its opinions that the Government has not shown that the defendant was a member of the Communist Party at the time of the conspiracy. The Court says that the Government has not shown that the defendant was a member of the Communist Party at the time of the conspiracy. The Court says that the Government has not shown that the defendant was a member of the Communist Party at the time of the conspiracy.

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appellant has not criticized this instruction, which points out certain facts that are necessary for the jury to believe, before they could find the issues in favor of the plaintiff.

The evidence in this case is not abstracted and so far as we have been able to ascertain from the record, there is no evidence whatsoever that the appellant did one thing to further this sale, after the lease was signed. As before stated the lessee was under no obligation whatsoever to buy the property and the record is bare of any evidence that the appellant did anything to assist in the sale of this property. There is no evidence that the defendant ever intended to pay the plaintiff anything for the sale of the property.

It is our conclusion that the jury properly found that the defendant was not liable to the plaintiff in any manner whatsoever for the sale of this property, and that the judgment of the trial court is hereby affirmed.

Judgment affirmed.



Anne Carey started a suit in the Circuit Court of Lake County to recover damages for personal injuries which she claimed she sustained when she fell in the National Tea Company's Store. She claims her fall was occasioned by the negligence of the defendant in failing to properly maintain and keep the floors of the store clean. On a jury trial a verdict of \$2250 was returned in her favor. The trial court denied the motion of the plaintiff for a judgment on the verdict, and denied her motion for a new trial. The defendant entered a motion for judgment notwithstanding the verdict. This motion was granted and the record is brought to this court by appeal by the plaintiff.

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APPEAL

Gen. No. 10609      Appeals No. 7

IN 1923

APPEAL FROM THE JUDICIAL

CHAMBER OF THE

COURT OF APPEALS

Appeal from  
District Court,  
Lake County.

ANNE ELLER GARY,  
Plaintiff-Appellant,  
vs.  
NATIONAL TRUST COMPANY, a corpora-  
tion,  
Defendant-Appellee.

WOLFE, -- J.

ANNE GARY stated a bill in the Circuit Court of  
Lake County to recover damages for personal injuries which  
she claimed she sustained when she fell in the window of the  
Company's store. She claimed her fall was occasioned by the  
negligence of the defendant in failing to properly maintain  
and keep the floors of the store clean. On a jury trial a  
verdict of \$250 was returned in her favor. The trial court  
denied the motion at the plaintiff for a judgment on the  
verdict, and denied her motion for a new trial. The defendant  
entered a motion for judgment notwithstanding the verdict.  
This motion was granted and the record is brought to this  
court by appeal by the plaintiff.



2.

On January 16, 1953, the following order was entered  
by the Court:

|       |                       |   |           |
|-------|-----------------------|---|-----------|
| 57381 | "Anne Carey           | ) |           |
|       | vs.                   | ) |           |
|       | National Tea Company, | ) | Complaint |
|       | a corporation         | ) |           |

"This day again come the parties herein by their respective attorneys. And said cause coming on to be heard in open Court on the motion heretofore entered herein by the said defendant at the close of all the evidence for a directed verdict, and the Court having heard the arguments of counsel and being fully advised in the premises, it is ordered that said motion be and the same is hereby allowed. It is, thereupon, further ordered by the Court that the verdict of the jury heretofore returned by the jury be and the same is hereby vacated and set aside."

On the 22nd day of January 1953, the plaintiff entered the following motion:

"MOTION FOR JUDGMENT ON THE  
VERDICT OF THE JURY AND  
IN THE ALTERNATIVE FOR  
A NEW TRIAL

"Now comes the plaintiff, ANNA CAREY, by Claude R. Calloway, her attorney and moves the Court to enter judgment for the said plaintiff and against the defendant on the verdict of the jury for the plaintiff entered herein and moves the Court to set aside and vacate its order of January 16, 1953, entering judgment in this said cause contrary to the verdict of the

On January 11, 1953, the following order was entered

by the Court:

27381 vs. "Name Omit"  
National Tea Company  
a corporation

Complaint

"This day, again, the parties moved for

their respective attorneys. And said motion was to be

heard in open court, in the action previously entered

by the said defendant as the cause of all the said

for a divorce, and the Court having heard the argu-

ment of counsel and being fully advised in the premises,

it is ordered that said motion be and the same is hereby

granted. It is, furthermore, further ordered by the Court

that the parties of the above mentioned motion of the day

be and the same is hereby vacated and set aside."

On the 23rd day of January 1953, the plaintiff entered

the following motion:

"Whereas the Plaintiff is the  
owner of the said  
in the action  
A and Vial

"Now comes the Plaintiff, JOHN D. DUFFY, by Duffey &

Calhoun, her attorney and moves the Court to enter judgment

for the said Plaintiff and against the defendant on the verdict

of the jury for the Plaintiff entered herein and moves the Court

to set aside and vacate the trial of January 11, 1953, whereby

judgment in this said cause contrary to the verdict of the

3.

jury returned herein and further moves the Court in the alternative to set aside the judgment entered herein for the defendant and that a new trial be granted to the plaintiff, and for reasons for said motion states the following:"

On the same day the Court entered the following order:

|       |                       |   |           |
|-------|-----------------------|---|-----------|
| 57381 | "Anne Carey           | ) |           |
|       | vs.                   | ) |           |
|       | National Tea Company, | ) | Complaint |
|       | a corporation         | ) |           |

"This day again come the parties herein by their respective attorneys. And on motion of the said plaintiff by her said attorney, it is ordered by the Court that said plaintiff be and she is hereby given leave to file written motion herein to set aside and vacate the order heretofore entered herein on January 16th, A. D. 1953, granting said defendant's motion for a directed verdict and setting aside and vacating said verdict; whereupon said written motion is filed herein.

"And thereupon said motion coming on to be heard in open Court and having been heard therein and the Court being now fully advised in the premises, it is ordered by the Court that said motion be and the same is hereby denied.

"It is, thereupon, further ordered by the Court that plaintiff's bond on appeal be and the same is hereby fixed at the sum of Two Hundred Fifty Dollars (\$250.00)."

On April 4, 1953, the plaintiff filed notice of appeal, which is as follows:



jury returned verdict and finding, and the Court is of the opinion that it was not within the jurisdiction of the Court to set aside the verdict and finding, and for reasons and that a new trial be granted to the plaintiff, and for reasons the said motion should be granted as follows:

On the same day the Court entered the following order:

|                  |                                                                             |             |
|------------------|-----------------------------------------------------------------------------|-------------|
| <p>Continued</p> | <p>And the Court<br/>do hereby<br/>National City Bank<br/>a corporation</p> | <p>1920</p> |
|------------------|-----------------------------------------------------------------------------|-------------|

"This day being the first day of

the respective attorneys, and as the Court is of the opinion that it is necessary to the proper administration of justice that the Court should set aside the verdict and finding and grant a new trial to the plaintiff, and for reasons the said motion should be granted as follows:

"And the Court do hereby order that the Court set aside the verdict and finding and grant a new trial to the plaintiff, and for reasons the said motion should be granted as follows:

On April 1, 1920, the plaintiff filed motion of appeal, which is as follows:

4.

"NOTICE OF APPEAL

TO: John T. Kennedy  
Querrey & Harrow  
135 S. La Salle Street  
Chicago 3, Illinois

"PLEASE TAKE NOTICE THAT ANNE ELLEN CAREY, Plaintiff and Appellant in the above entitled cause hereby appeals to the Appellate Court of Illinois, Second District from an order entered in this cause in the Circuit Court of Lake County, Illinois on January 16, 1953, directing a verdict in favor of the above named Defendant and Appellee and entered a judgment January 16, 1953, on such directed verdict in favor of said Defendant and from the order or orders entered in said Circuit Court of Lake County, Illinois on January 23, 1953, denying the motion of the Plaintiff, ANNE ELLEN CAREY, for judgment in favor of said Plaintiff on the verdict of the jury in the amount of Two Thousand Two Hundred Fifty (\$2,250.00) Dollars and in the alternative for a new trial.

"Plaintiff, ANNE ELLEN CAREY, prays that said judgment and orders in favor of the Defendant and against the Plaintiff be reversed and that judgment be entered on the verdict of the jury in favor of the Plaintiff in the amount of Two Thousand Two Hundred Fifty (\$2,250.00) Dollars or that in the alternative the cause be remanded to the Circuit Court of Lake County, Illinois for a new trial.

ANNE ELLEN CAREY, Plaintiff-Appellant

BY Claude R. Calloway  
Her Attorney."

It will be noted that this appeal is from the order entered by the Court on January 16, 1953, as above stated.

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70-10111-1, 20517-10111-1, 20517-10111-1, 20517-10111-1

and in the alternative for a new trial.

[illegible]

CONFIDENTIAL - SECURITY INFORMATION

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It will be noted that this subject is from the water  
collected by the Coast on January 16, 1913, as above noted.



5.

The first question confronting this Court for consideration is whether this is a final appealable order as provided by our Statute. Only such orders, judgments or decrees that are final are appealable. The same question was presented to this Court in the case of LeMenager vs. Northwestern Barb Wire Co., 296 Ill. App. 568. What we said in that opinion is applicable here and is as follows: "Following the above order of the trial court denying appellant's motion for judgment notwithstanding the verdict, it filed its notice of appeal, and pursuant thereto has brought the record to this court for review.

"An appeal from the verdict of a jury will not lie. Harrison v. Singleton, 2 Scam. 21; Evanston v. Downen, 55 Ill. App. 217; Breesee Coal & Mining Co. v. Olney Elec. L. & P. Co., 109 Ill. App. 539, 540; Mitchell v. Eareckson, 250 Ill. App. 508, 515. There must be a judgment entered on the verdict before there can be a review thereof. The verdict of a jury before it has received the sanction of the court, by passing into a judgment, is not subject to review on appeal in actions such as the present one. At common law it was a well settled rule that in all cases, a judgment must precede an execution, and while this rule is now subject to many statutory innovations, yet in actions such as the instant case, no execution for the debt could issue without a final judgment against the defendant. Hence a judgment in this case could not be regarded as final for purposes of appeal until it had been entered in such a manner that execution might issue thereon.

"An order granting or denying a motion for judgment



notwithstanding the verdict, is not appealable, because such an order is not a judgment, but merely a ruling that the moving party is or is not entitled to a judgment. Until the judgment is entered there has been no legal determination of the cause, and nothing to appeal from exists. Judgments must be first entered as ordered and the appeal taken from the judgment. The order denying appellant's motion for judgment notwithstanding the verdict, merely reaffirmed the court's ruling in denying appellant's motions for a directed verdict. An order for a judgment upon which no judgment is ever entered, is not a final judgment within the meaning of the statute so as to render it appealable. Appeals lie from final judgments, orders or decrees. Ch. 110, sec. 201, Ill. Rev. Stat. 1937 (Jones Ill. Stats. Ann. 104.077.)

"In a suit at law such as the instant one, a judgment can speak but by the record. In this case the record fails to show that any judgment was ever entered on the verdict. "The verdict of the jury is the basis upon which the judgment of the court is entered and is not the judgment of the court." *People vs. Montgomery*, 365 Ill. 478, 481. Where the record fails to show that final judgment has been rendered by the trial court upon the verdict, there is nothing for this court to review, and the appeal will be dismissed."

In the present case there is no motion to dismiss the appeal, but it is incumbent upon the Court when it discovers

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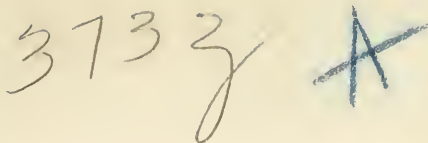
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that there is no final judgment entered by the trial court for this Court to meet and decide this question, as all orders, judgments or decrees to be appealable must be final. The People vs. C. B. & Q. R. R. Co., 306 Ill. 166. Watson vs. Hobson, 396 Ill. 617. There being no final judgment entered in this case the appeal is hereby dismissed.

Appeal dismissed.

that there is no limit imposed on the total weight  
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 of interest to the public are of interest to the public.  
 The total weight is not and should not be limited, as all weights  
 of interest to the public are of interest to the public.  
 The total weight is not and should not be limited, as all weights  
 of interest to the public are of interest to the public.

Approved: \_\_\_\_\_



Gen. No. 10703

Agenda No. 10.

351 I.A. 569<sup>2</sup>

vs.

Appeal from  
Circuit Court of  
Kankakee County.

Robert Cummings procured a judgment of \$12,000 in the Circuit Court of Kankakee County, against William Dunn for injuries that he sustained in a collision between the car which he was driving and the one that Dunn had left standing on a hard road in Will County. The defendant, Dunn, filed an answer and a cross complaint for the damage that was done to his car. The case was tried before a jury that found for the plaintiff on his complaint and against the defendant on his counterclaim.

The defendant, Dunn, entered a motion for judgment notwithstanding the verdict in favor of Cunnings and also for judgment notwithstanding the verdict in the jury's finding

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Admission

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for the cross defendant, upon the cross complaint. The motion for judgment notwithstanding the verdict was sustained as to the judgment for the plaintiff against the defendant, but overruled as to the judgment for the defendant in his counterclaim. The Court vacated and set aside the judgment in favor of the plaintiff, and entered judgment in favor of the defendant. The original plaintiff has perfected an appeal from this judgment and the defendant has assigned cross errors on the Court's refusing to set aside the verdict on his cross complaint.

Illinois State Highway No. 113 south is paved with a nine foot concrete slab and a four foot black top on either side. The plaintiff, Robert Cummings, was driving his automobile over said highway and he collided with the car of William Dunn, which had been left standing upon the highway. Dunn's car had stalled from some kind of engine trouble, and he left it standing with the left wheels on the concrete pavement, a few feet south of the black line down the center of the highway. When Robert Cummings was driving along said highway, he met a convoy of eight new cars. As Cummings was approaching the Dunn car he noticed it when he was about five hundred feet from it. According to his testimony, he did not see it again until he was within twenty or twenty-five feet of it, then he put on his brakes, but could not stop, and he hit the car and his injuries followed. According to Mr. Dunn's testimony his starter on the car was in first-class order, and he tried to start the car, but could not do so, and he left



for the same reason, that the same condition, the same  
 low judgment notwithstanding the fact that was contained in the  
 the judgment for the plaintiff against the defendant, the  
 reversed as to the judgment for the defendant in his counter-  
 claim. The Court stated and said that the judgment in favor  
 of the plaintiff, and against the defendant in favor of the defendant,  
 the plaintiff's claim was reversed as against the defendant,  
 and the defendant's claim was reversed as against the plaintiff,  
 and the result was that the judgment in the case was reversed.

Illinois State Bank, et al. vs. The People of the State of  
 Illinois, et al. The Court said that the judgment in the case  
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 and against the defendant, and the result was that the judgment  
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 the case was reversed as to the plaintiff, and against the defendant,  
 and the result was that the judgment in the case was reversed.

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it standing where it stopped, and went to a neighbor to get gasoline, as he thought he was out of gas. While he was gone the accident happened. From the time he left the car standing until he got back, after the collision of the Cunnings' car with his, a half hour had elapsed. He made no effort whatsoever, to move the car off of the traveled part of the pavement.

The defendant introduced in evidence three photographs of the road at the point and near where the collision occurred. It shows the pavement and a wide grassy, or weedy shoulder on both sides of the paved portion of the road. The plaintiff, Cunnings, said he was driving at the rate of forty to forty-five miles an hour. He hit the Dunn car with such force that it knocked it off of the road over into a field, and he himself then drove into a ditch by the side of the road.

It is insisted by the appellant that the Court erred in setting aside the verdict and judgment in his favor and rendering judgment in favor of the defendant because there was sufficient evidence to go to the jury for their consideration, and they are the ones that should decide whether the plaintiff was in the exercise of ordinary care and caution for his own safety just before, and at the time of the collision. Generally such questions are left to the jury for their decision, but when there is no question in regard to the facts, then it may become a question of law to be decided by the Court whether there is any evidence tending





4.

to support the plaintiff's case. Courts are reluctant to set aside a verdict of a jury on questions of fact, but when a clear case is presented to them, they must decide such cases as a matter of law. Cooney vs. Landon Cartage Co., 308 Ill. App. 444. A motion for judgment notwithstanding the verdict should be allowed when all the evidence is considered with all reasonable inference to be drawn therefrom, in its aspect most favorable to the party against whom the motion is directed, if there is a total failure to prove one or more necessary elements of the case. The plaintiff himself was the only eyewitness to this accident, and he testified that he saw the car when he was five hundred feet away from it, and he did not look again until he was within twenty or twenty-five feet of this car. He gave as his reason for not seeing it again, was because he thought the defendant's car was moving; that on account of meeting the convoy of cars, it was necessary for him to pull to the right of the center of the road with his right wheels on the dirt shoulder, which was rough and had holes in it. This should not excuse him from looking ahead and seeing a car that was in plain sight, on the highway. The pavement was dry and the sun was shining, so it seems to us that the Court properly found that the plaintiff was guilty of contributory negligence as a matter of law, that was the proximate cause of his injuries and properly set aside the verdict of the jury, and the judgment that had been entered in favor of the plaintiff.

As before stated, the jury found the issues in favor



5.

of the original plaintiff on defendant's counterclaim. The defendant now insists that it was not negligence for him to leave his car unattended on a paved highway. We cannot agree with this contention. He left it there contrary to the Statute regulating motor vehicle traffic. This was charged in plaintiff's complaint. It appears from the evidence that it was not impossible for him to move his car off of the traveled part of the highway, as it is a well-known fact that on the level pavement such as this, a car can be moved by using the starter and there is no evidence to the contrary that it could not be done in this case. We are satisfied that the jury properly found that the defendant was negligent in not attempting to move his car from the highway, and by leaving it there. The Court properly found that the verdict of the jury should not be set aside in respect to defendant's motion for judgment on his counterclaim.

The judgment of the trial court is hereby affirmed.

Judgment affirmed.















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